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**THE  
CONSTITUTIONAL LAW  
OF THE  
UNITED STATES**

**SECOND EDITION**

**BY**

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**CONCEPTS OF PUBLIC LAW"; ETC.**

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VOLUME III

# UNITED STATES CONSTITUTIONAL LAW

## VOLUME III

### CHAPTER LXXIII

#### POLITICAL QUESTIONS <sup>1</sup>

##### § 844. Political Questions.

Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass judgment upon the policy of legislative or executive action. Where, therefore, discretionary powers are granted by the Constitution or by statute, the manner in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the existence and extent of these discretionary powers.

As distinguished from the judicial, the legislative and executive departments are spoken of as the political departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy. These considerations of public or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute, but, within these limits, they do permit the departments, separately or together, to recognize that a certain set of facts exists or that a given status exists, and these determinations, together with the consequences that flow therefrom, may not be traversed in the courts.

In the exercise of his political powers, not only the President but those acting under his order are exempt from judicial control. In *Marbury v. Madison*,<sup>2</sup> Marshall said: "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist no power to control that discretion. The subjects are politi-

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<sup>1</sup> Questions closely connected with those discussed in this chapter are considered by the author in his *Fundamental Concepts of Public Law*, especially in Chapters XVIII, XX, XXI, XXII and XXV. For an excellent discussion of political questions as defined by American courts see the article by Professor Oliver P. Field "The Doctrine of Political Questions in Federal Courts" in 8 *Minnesota Law Review*, 485. See also article by Professor P. B. Potter, "The Political Question in International Law in the Courts of the United States" in 8 *Southwestern Political and Social Science Quarterly*, 127.

<sup>2</sup> 1 Cr. 137.

cal. They respect the Nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is to be communicated. The acts of such an officer, as an officer, can never be examined by the courts."

No comprehensive enumeration of these political determinations has been attempted by the courts, nor, indeed, is such an enumeration possible. Specifically, however, the following have been decided to be political and, therefore, not justiciable:

**§ 845. Cherokee Indians v. Georgia.**

In the *Cherokee Nation v. Georgia* <sup>3</sup> an injunction was prayed to restrain the State of Georgia from executing certain laws within that State, which, it was alleged, would annihilate the Cherokees as a political body. The suit was dismissed on the ground of lack of jurisdiction, it being held that the Cherokee Nation was not a foreign State in the sense in which the term is used in the provision of the Constitution which extends the Federal judicial power to "controversies between a State or the citizens thereof, and foreign States, citizens or subjects." Marshall, however, in his opinion went on to say: "A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee Nation, this court cannot interpose, at least in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question." As this last sentence shows, all of Marshall's opinion which has been quoted was purely *obiter*, but was later relied upon by the court in *Georgia v. Stanton*.<sup>4</sup>

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<sup>3</sup> 2 Pet. 1.

<sup>4</sup> 6 Wall. 50.

**§ 846. Georgia v. Stanton.**

The difficulty sometimes experienced in deciding between a justiciable and a non-justiciable question is well illustrated in this latter case.

Here a bill was filed invoking the original jurisdiction of the Supreme Court to restrain the Secretary of War, the General of the Army, and Major-General Pope from putting into effect the acts of Congress of 1867, providing for military government in the State of Georgia.<sup>5</sup> The bill alleged that the intent of the acts of Congress as apparent on their face and by their very terms was to overthrow the existing constitutional government of the State and to substitute an unconstitutional one therefor. In declining to issue the orders prayed for, the court said:

"In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing State Government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of the means and instrumentalities whereby its existence might, and otherwise would, be maintained.

"This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

"That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of person or property but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction,

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<sup>5</sup> In *Mississippi v. Johnson* (4 Wall. 475) the attempt had been made to restrain the President of the United States from executing the reconstruction acts, but the bill had been dismissed on the ground that an injunction or mandamus would not lie to the chief executive of the nation.

of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.”<sup>6</sup>

### § 847. Existence and Territorial Extent of Sovereignty.

The existence and territorial extent of the sovereignty of a State, involving, of course, the question as to the *de jure* character of a government, have been held to be political questions.

In *Foster v. Neilson*<sup>7</sup> was involved the determination whether Spain or the United States had sovereignty over a given district. The decision as to this, the court held, was a purely political one to be made by the executive, and without judicial power of revision. In his opinion Marshall declared: “If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature.”

In *Wilson v. Shaw*<sup>8</sup> it was contended that the title of the United States to the Panama Canal Zone had not been acquired (as provided in the act of Congress of June 28, 1902),<sup>9</sup> by the treaty with the Republic of Colombia. To this contention the court replied: “The title to what may be called the Isthmian or canal zone, which, at the date of the act, was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the canal zone, was duly ratified. Congress has passed several acts based upon the title of the United States. These show

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<sup>6</sup> “It is true,” the opinion continued, “the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, State Capitol and executive mansion, and other real and personal property; and that putting the acts of Congress into execution and destroying the State, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.”

<sup>7</sup> 2 Pet. 253.

<sup>8</sup> 204 U. S. 24.

<sup>9</sup> 32 Stat. at L. 481.



a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the government in its action within the limits of the Constitution.”<sup>10</sup>

In *Ex parte Cooper*<sup>11</sup> the court expressed itself bound by the action of the political departments claiming jurisdiction to an extent exceeding fifty-nine miles from the shore of Alaska. It was intimated, however, that, should a case involving private rights arise, but bearing upon a point public in its nature which had not been passed upon by the political departments, the court would be constrained itself to decide the point.

The political departments of the United States Government, that is to say, the executive and legislative departments, have the final and conclusive word not only as to the existence of American sovereignty over a given district, but as to which of two or more contending foreign States shall be recognized by the American Government to have *de jure* jurisdiction. This was declared in *Williams v. Suffolk Insurance Co.*<sup>12</sup> In this case a vessel, insured generally against loss, was ordered by the government of Buenos Ayres not to catch seal off the Falkland Islands. The master of the schooner denied the jurisdiction of Buenos Ayres, and was captured and condemned by the authorities of Buenos Ayres. Upon suit being brought for the insurance, these facts were set up by the insurers. The Supreme Court, however, refused to consider the evidence as to sovereignty, but held itself concluded by the action of the political departments of the United States Government, saying: “Can there be any doubt that when the executive branch of the government, which is charged with the foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union. If this were not the rule cases might often arise in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character.”

Again, in *Jones v. United States*<sup>13</sup> the court said: “Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the

<sup>10</sup> Citing *Jones v. United States* (137 U. S. 202), and *Re Cooper* (143 U. S. 472).

<sup>11</sup> 143 U. S. 472.

<sup>12</sup> 13 Pet. 415.

<sup>13</sup> 137 U. S. 202.

determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects, of the government. All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

#### § 848. War: Belligerency: Neutrality.

From the cases already cited, it follows that determinations by the political departments as to existence of a status of independence, or of war, or of belligerency, are not reviewable by the courts.

In *United States v. Palmer* <sup>14</sup> Marshall declared: "Those questions which respect the rights of a part of a foreign empire which asserts or is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country . . . are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise, to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—or may make a limited recognition of it. The proceedings in the court must depend so entirely on the course of the government that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against the enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to array the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department." <sup>15</sup>

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<sup>14</sup> 3 Wh. 610.

<sup>15</sup> In *The Divina Pastora* (4 Wh. 52) Marshall again said: "The decision at the last term, in the case of the *United States v. Palmer*, establishes the principle that the government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy." See also *The Santissima Trinidad* (7 Wh. 283); and *Kennett v. Chambers* (14 How. 38).

Of course the courts of one country are not bound by the decisions of another country as to the territorial extent of jurisdiction of that country, or indeed as to any question of international law and right. In *Rose v. Himely*<sup>16</sup> the court, speaking through the mouth of Marshall, said: "Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decisions must be respected. But if it exercise a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all. Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it confessed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of the nations."

#### § 849. Treaties: Existence of.

Whether or not a treaty or other international agreement which the United States may have entered into with a foreign country has been sufficiently ratified by that country is for the political departments of our government to determine, as is also the continuing existence of a treaty.<sup>17</sup>

#### § 850. Diplomatic Agents.

Whether or not a given person is to be recognized as the accredited agent, consular or diplomatic, of a foreign government, is, also, a question for final determination by the political department.<sup>18</sup>

<sup>16</sup> 4 Cr. 241.

<sup>17</sup> In *Doe v. Braden* (16 How. 635) the court said: "It is said, however, that the King of Spain by the constitution under which he was then acting and administering the governments, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the Cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent. But these are political questions and not judicial. They belong exclusively to the political department of the government." See also *Wilson v. Shaw* (204 U. S. 24).

In *Terlinden v. Ames* (184 U. S. 270), the question was as to whether a treaty entered into between the United States and Prussia in 1852 was still in existence, although by the entrance of the latter country into the German Empire, it had ceased to be an independent State. The court held that the political departments of the United States had continued to treat the treaty as subsisting and that they were bound thereby, saying: "Without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

<sup>18</sup> *Ex parte Baiz* (135 U. S. 403).

**§ 851. Foreign Relations: Acts of Foreign Governments.**

In *Oetjen v. Central Leather Co.*<sup>19</sup> the court, after reviewing political conditions in Mexico, said: "The court will take judicial notice of the fact that since the transactions thus detailed and since the trial of this case in the lower courts, the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917." <sup>20</sup> And, later in the same opinion: "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." <sup>21</sup>

The court also pointed out that it was established that when a government which originates in revolution or revolt is recognized by the political department of the United States Government as the *de jure* government of the country in which it is established, the recognition is retroactive in its effect and validates all the acts of the government so recognized from the time of the beginning of its existence.<sup>22</sup> The court also quoted with approval the following from the opinion of the court in *Underhill v. Hernandez*: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers as between themselves." <sup>23</sup> The court added: "Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to re-examination and modification by the courts of this country.

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<sup>19</sup> 246 U. S. 297.

<sup>20</sup> Citing *Jones v. United States* (137 U. S. 202), and *Underhill v. Hernandez* (168 U. S. 250).

<sup>21</sup> Citing *United States v. Palmer* (3 Wh. 610); *Foster v. Neelson* (2 Pet. 253); *Garcia v. Lee* (12 Pet. 511); *Williams v. Suffolk Ins. Co.* (13 Pet. 415); and *In re Cooper*, 143 U. S. 472.

<sup>22</sup> Citing *Williams v. Bruffy* (96 U. S. 176); *Underhill v. Hernandez* (168 U. S. 250).

<sup>23</sup> Citing also *American Banana Co. v. United Fruit Co.* (213 U. S. 347).

"The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"

In *Kennett et al. v. Chambers*<sup>24</sup> the validity of certain contracts depended upon the status of Texas prior to its annexation to the United States, and the court was asked to determine for itself what that status was. As to this the court declared itself bound by the actions of the political departments of the United States Government. The court said: "It is a sufficient argument to say that the question whether Texas had or had not at the time become an independent State, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent State, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign State before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department." <sup>25</sup>

### § 852. De Jure Character of Governments of the States of the Union.

In *Luther v. Borden*<sup>26</sup> it was held that the judiciary was not competent to reverse the decision of the political departments of the National Government as to which of two contesting organizations is the *de jure* government of a State of the Union. *A fortiori* it was held that it was not competent for State courts to question the *de jure* character of the government from which they derived their standing as courts.

Other cases in which it has been questioned in the Supreme Court whether, in specific instances, the Governments of States of the Union were republican in character, as required by the Federal Constitution, are elsewhere discussed. It may be said here, however, that it has been held that the enforcement of this constitutional requirement depends "upon political

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<sup>24</sup> 14 How. 38.

<sup>25</sup> Citing *Rose v. Himely* (4 Cr. 272), and *Hoyt v. Gelston* (5 Wh. 324).

<sup>26</sup> 7 How. 1.

and governmental action through powers conferred upon the Congress of the United States.”<sup>27</sup>

In *Commonwealth of Massachusetts v. Mellon*<sup>28</sup> it was contended that an act of Congress which had authorized appropriations from the Federal treasury for certain purposes by the States provided they made similar appropriations from their treasuries, should be declared unconstitutional in that thus a matter of local State concern was drawn under Federal control. The court gave various reasons for holding that the case was not a justiciable one, and, among them, was the following: “In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.”

### § 853. Other Political Questions.

The extent of the immunity from judicial control of matters of international concern is well illustrated in the case of *United States ex rel. Boynton v. Blaine*,<sup>29</sup> decided in 1890, in which the general doctrine was reviewed and affirmed that mandamus will not issue to control the executive department with reference to claims prosecuted by it against foreign governments in behalf of private persons. In this case a mandamus was sought to compel the Secretary of State to pay over to the petitioner certain sums of money paid to the United States by Mexico under an award made in his favor under a convention that had been entered into between the United States and Mexico. The Secretary of State, acting under the direction of the President, was withholding the payment to the petitioner pending an investigation of fraud. The court held that the matter was still pending before the department, that the principle of *res adjudicata* could not be invoked against the United States by the individual claimants, and that the judicial department could not intervene.

In *Martin v. Mott*<sup>30</sup> it was held that the courts could not question the correctness of the decision of the President, acting under the authority of a law enacted February 28, 1795, as to the necessity for calling out the militia to repel an invasion or suppress an insurrection.

In *Neely v. Henkel*<sup>31</sup> the court held that it was not competent for the judiciary to make any declaration as to the length of time Cuba should be occupied and controlled by the military forces of the United States, “it

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<sup>27</sup> *Marshall v. Dye* (231 U. S. 250). See also *Pacific States Tel. & Tel. Co. v. Oregon* (223 U. S. 118).

<sup>28</sup> 262 U. S. 447.

<sup>29</sup> 139 U. S. 306.

<sup>30</sup> 12 Wh. 19.

<sup>31</sup> 180 U. S. 109.

being," said the court, "the function of the political branch of the government to determine when such occupation and control shall cease, and, therefore, when the troops of the United States shall be withdrawn from Cuba."

In *United States v. Holliday* <sup>32</sup> the existence of tribal relations among Indians was declared to be a matter for political determination.

#### § 854. Suits Between the States.

Though questions of the extent of political jurisdiction are, as has been seen, essentially political in character, they are, as between the individual States of the Union, justiciable in the Supreme Court. This, however, is due to the express provision of the Constitution giving to that court original jurisdiction over "controversies between two or more States." This precise question is more particularly discussed in a later chapter dealing with suits between States.<sup>33</sup>

#### § 855. Courts Will Exercise Jurisdiction when Private Rights Are Involved.

In all the foregoing cases the courts held themselves bound by the positions assumed by the executive and legislative departments. When, however, private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.

Thus, as has been set forth in another chapter, treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the court will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar.

In *Ex parte Cooper* <sup>34</sup> the court, after asserting the principle that it would not pass upon a matter purely political in character, was careful to say: "We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

In the year following that in which this case was decided, the United States entered into a convention with Great Britain providing for an

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<sup>32</sup> 3 Wall. 407.

<sup>33</sup> See Chapter LXXV.

<sup>34</sup> 143 U. S. 472.

arbitration of the political question (the extent of territorial sovereignty of the United States in the Behring Sea) involved in the Cooper case. An award was made under this convention, and Congress passed an act giving to it full effect. Later, a case again coming before a Federal Circuit Court of Appeals, that tribunal held itself conclusively bound by the terms of the convention in opposition to the position of the political department at the time of the Cooper case. The opinion declared:

"This question has been settled by the award of the arbitrators, and this settlement must be accepted 'as final.' It follows therefrom that the words 'in the waters thereof,' as used in section 1956, and the words 'dominion of the United States in the waters of Behring Sea,' in the amendment thereto, must be construed to mean the waters within three miles from the shore of Alaska. In coming to this conclusion, this court does not decide the question adversely to the political department of the government. It is undoubtedly true, as has been decided by the Supreme Court, that, in pending controversies, doubtful questions which are undecided must be met by the political department of the government. 'They are beyond the sphere of judicial cognizance,' and 'if a wrong has been done, the power of redress is with Congress, not with the judiciary.' The *Cherokee Tobacco*, 11 Wall. 616. But in the present case there is no pending case left undetermined for the political department to decide. It has been settled. The award is to be construed as a treaty which has become final. A treaty when accepted and agreed to becomes the supreme law of the land. . . . The duty of courts is to construe and give effect to the latest expression of the sovereign will; hence it follows that, whatever may have been the contention of the government at the time *In re Cooper* was decided, it has receded therefrom since the award was rendered, by an agreement to accept the same 'as a full, complete and final settlement of all questions referred to by the arbitrators,' and from the further fact that the government since the rendition of the award has passed 'an act to give effect to the award rendered by the tribunal of arbitration.' " <sup>35</sup>

Commenting on this case, Judge Baldwin observes: "It will be noted that this result was reached in a suit by the United States in one of their own courts, in which the claim of the government was one of territorial boundary, and yet that court overruled the claim and threw out the suit on the strength of an award made in pursuance of the law of the land. The treaty was the law. This law provided for the award and made it, whichever view should be adopted, final. It was therefore for the court to accept it as final, even against the resistance of the political department of the government, and do justice accordingly." <sup>36</sup>

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<sup>35</sup> *The La Nina* (75 Fed. Rep. 513).

<sup>36</sup> *The American Judiciary*, p. 41.



**§ 856. Courts Will Not Perform Administrative Functions.**

From the foregoing it appears that the courts themselves decline to assume jurisdiction with reference to matters of a political character. So also, they have held that it is beyond the constitutional power of Congress to impose upon them the performance of duties essentially administrative in nature. The instances in which the lower Federal courts have refused to perform administrative functions are considered in another chapter.<sup>37</sup> So also, it has been held that these courts sitting as equity tribunals may exercise only those powers of English courts of chancery which were judicial in character, and not those exercised by the chancellor as the representative of the King and by virtue of the King's prerogative as *parens patriæ*.<sup>38</sup>

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<sup>37</sup> Chapter LXXXVIII, The Separation of Powers.

<sup>38</sup> *Fontain v. Ravenel* (17 How. 369; 15 L. ed. 80).

## CHAPTER LXXIV

### ADMIRALTY AND MARITIME JURISDICTION

#### § 857. Admiralty and Maritime Defined.

The Federal judicial power is, by Article III, Clause 1, expressly declared to extend to "all cases of admiralty and maritime jurisdiction."

These two terms "admiralty" and "maritime," though largely overlapping in their application, are not wholly synonymous. In England "maritime" had reference primarily to causes of action arising upon the high seas and governed by what was known as general maritime law, that is, the general practice of nations. "Admiralty," upon the other hand, had, in England, primary reference to causes of a local nature, and governed by local maritime law, such as, for example, police measures relating to shipping and harbors, fishing regulations, etc. However, the jurisdiction of both admiralty and maritime causes, as thus distinguished, was, by the English law, vested in the courts of the Admiral of the English Navy.<sup>1</sup> There is, therefore, some justification for the statement that, at the time the Constitution was adopted, "maritime" had reference to the character of the causes, and "admiralty" had reference to the tribunals in which they were tried.

Since the Constitution uses the terms without defining them, their scope, it might appear, should be determined by the meanings attached to them at the time of the adoption of the Constitution by British practice. In fact, however, this was done by the American courts in their early decisions to only a limited extent. The chief reason for this was that, in England, there had been a long and jealous struggle for jurisdiction between the admiralty and the common-law courts with the result that the jurisdiction of the admiralty courts had been very greatly restricted. These restrictions upon admiralty jurisdiction, in so far as they excluded from it causes essentially maritime in character, the United States Federal courts did not feel themselves obligated to accept, and thus we find Justice Washington, in *Davis v. Brig Seneca*,<sup>2</sup> saying that the extent of the judicial power of the United States with reference to admiralty and maritime cases was not to be determined by that of the admiralty court in England, but

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<sup>1</sup> The Admiral's jurisdiction, indeed, extended at one time to causes that were not maritime at all, inasmuch as it embraced all cases arising "beyond the seas," that is, beyond the seas surrounding the British Isles. On the other hand, it is to be noted that some causes, essentially maritime in character, were cognizable by other than courts of admiralty.

<sup>2</sup> Fed Cas. No. 12,670.

by the recognized principles of maritime law as "respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe."

This doctrine was declared in a long series of cases, and found final statement by the Supreme Court in *New Jersey Steam Navigation Co. v. Bank*,<sup>3</sup> in which the court upheld the Federal admiralty jurisdiction, although, as was admitted, the case would not be so cognizable if the jurisdiction of the admiralty in England were to be accepted as defining that of the American courts. "It is insisted," said the court, "that, whatever may have been the doubt, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed. We are inclined to concur in this view."<sup>4</sup>

As regards legislative precedent, it is to be noted that the First Congress, in the Judiciary Act of 1789, vested in the Federal courts an admiralty jurisdiction far wider than that possessed by the admiralty courts in England.<sup>5</sup>

Since the beginning, then, the admiralty and maritime jurisdiction of the United States has been of a double nature: that over cases depending upon acts committed upon the seas; and that over contracts, and other transactions connected with the sea. In the former class of cases, the jurisdiction is given by the locality of the act; in the latter class, by the character of the act or transaction.

The cases falling within the Federal admiralty jurisdiction because of the locality, i. e., founded upon acts committed upon the high seas and other navigable waters, are, broadly speaking, of two classes; those of prize, arising *jure belli*; and those acts, torts, injuries, etc., which have no reference to a state of war.

Those cases which fall within the admiralty jurisdiction purely because of their maritime nature are those arising out of contracts, claims, etc., with reference to maritime operations. In actions of tort the test determining jurisdiction is locality; in contracts, it is the subject matter.<sup>6</sup>

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<sup>3</sup> 6 How. 344.

<sup>4</sup> The opinion goes on to state in detail the grounds in support of this view.

<sup>5</sup> Section 9 of this act declared that the District Courts should have exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of imposts, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

<sup>6</sup> *Waring v. Clarke* (5 How. 441); *New Jersey Steam Navigation Co. v. Merchants' Bank* (6 How. 344).

This jurisdiction has been exclusive in the Federal courts, though common-law remedies are available to suitors where the common law is competent to give it.<sup>7</sup>

### § 858. Spatial Extent of Admiralty Jurisdiction.

There was at first a disposition upon the part of the Supreme Court to give to the Federal courts a narrow admiralty jurisdiction, specially considered, corresponding with that then exercised by the English court, but, moved especially by the arguments of Justice Story, a much wider sphere of admiralty power was later upheld.

According to the earlier decisions, the Federal admiralty jurisdiction was confined to cases arising upon the high seas and upon rivers as far as the ebb and flow of the tide extended, in this respect following substantially the English doctrine. However, in *Waring v. Clarke*,<sup>8</sup> it was definitely stated that, in determining this matter of jurisdiction, as constitutionally provided for, the American courts would not feel themselves obliged to follow the English practice.<sup>9</sup> The way was thus prepared for the decision of the court in *The Genesee Chief*,<sup>10</sup> which, expressly overruling the earlier cases, declared that the Federal admiralty jurisdiction extends over all public navigable waters upon which commerce is carried on between different States or with foreign nations.<sup>11</sup>

Chief Justice Taney rendered the opinion of the court. In it he first called attention to the fact that the statute was not one in exercise of the power of Congress to regulate foreign or interstate commerce, and that, though closely related, the Federal commercial and admiralty powers were to be clearly distinguished from each other. "The extent of the judicial power," said the Chief Justice, "is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And the limits fixed

<sup>7</sup> Judiciary Act of 1789, Section 9. See note 5 on preceding page.

<sup>8</sup> 5 How. 441.

<sup>9</sup> The reasons for this conclusion were stated at length by the court in its opinion in this case.

<sup>10</sup> 12 How. 443.

<sup>11</sup> The case of *The Genesee Chief* arose under, and, therefore, involved the constitutionality of, the act of Congress of 1845 extending the jurisdiction of the Federal district courts to certain cases arising upon the great lakes and upon the navigable waters connecting them.

Congress has never attempted to extend the admiralty jurisdiction of the Federal courts beyond "Navigable waters of the United States," and these, as later declared in the cases of *The Daniel Ball* (10 Wall. 557), in contradistinction to the navigable waters of the States, are those which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes by which such commerce is conducted by water."

by the Constitution to the judicial authority of the courts of the United States, would form an insuperable objection to this law, if its validity depended upon the commercial power. . . . If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted."

The opinion continued: "If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the Admiralty Court to administer international law, and if the one cannot be established, neither can the other.

"Again, the Union is formed on the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tidewater rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western States. Certainly such was not the intention of the framers of the Constitution; . . . The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; . . . Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, or anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

The Chief Justice then pointed out that the limitation of admiralty jurisdiction to tidal waters is a reasonable one in England because in that country there are no navigable streams which go beyond the flow and ebb of the tide; and that at the time this rule was accepted by the court in this country

there was little commerce except upon such waters. Referring to the case of *The Thomas Jefferson*, the opinion concluded: "As we are convinced that the former decision was founded in error, and, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."

The limitation of admiralty jurisdiction to tidal waters being abandoned, the further extension of the jurisdiction to all the great navigable waters within the United States soon followed.<sup>12</sup>

#### **§ 859. Admiralty Jurisdiction Extends to Navigable Waters Wholly within a State.**

The Federal admiralty jurisdiction, being wholly independent of the power to regulate interstate commerce, and attaching whenever the cause of action has arisen on navigable water, jurisdiction extends over all cases arising upon navigable waters even though they be wholly within the confines of a particular State, provided they constitute connecting links in chains of commercial communication between States. In *The Daniel Ball* <sup>13</sup> the court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are so used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

In *The Montello* <sup>14</sup> the same principle was applied to the Fox river of Wisconsin, although its navigability was interrupted by rapids and falls around which portages had to be made.

Federal admiralty jurisdiction is not affected by the fact that at the time of the accruing of the cause of action the vessel or vessels concerned are upon a voyage between ports of the same State.<sup>15</sup>

#### **§ 860. Definition of Public Navigable Waters.**

In *The Daniel Ball* and *The Montello* cases the court was called upon to determine what were navigable waters of the United States within the defi-

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<sup>12</sup> *The Magnolia* (20 How. 296).

<sup>13</sup> 10 Wall. 557.

<sup>14</sup> 20 Wall. 430.

<sup>15</sup> *The Belfast* (7 Wall. 624), overruling previous cases as to this. For an argument that the Federal admiralty jurisdiction should not be construed to extend to contracts for the repairs of vessels engaged wholly in commerce within a State, see the dissenting opinion of Justice Brewer in *Perry v. Haines* (191 U. S. 17).

nition of the term as used in acts of Congress. Inasmuch as the Federal admiralty jurisdiction is distinct from the commerce power, and inasmuch as navigability has been accepted as the test of admiralty jurisdiction, there might appear to be no constitutional difficulty in the way of a provision by Congress further extending the Federal admiralty jurisdiction over navigable waters located wholly within a State and not constituting links in a continued highway over which commerce is or may be carried on with other States or foreign countries. As to this, however, it is to be observed that, as to them, the practical reasons stated by Chief Justice Taney in justification of including within the admiralty jurisdiction navigable waters which are highways, or links of highways in interstate and foreign commerce, would not apply. This fact, the Supreme Court might find sufficient to render constitutionally unjustifiable an attempted extension by Congress of the admiralty jurisdiction to waters which, though navigable, would not meet this test.

#### § 861. Extent of Federal Control of Navigable Waters: Recent Cases.

The extent of the Federal control over navigable waters is more fully considered in connection with the discussion of the commerce powers of the National Government. It will, however, be appropriate here to refer to a few of the more recent cases.

It is established that, as an incident to the improvement of the navigability of streams Congress may create and use or lease water power. Thus, in *United States v. Chandler-Dunbar Water Power Co.*,<sup>16</sup> after pointing out that the judgment of Congress as to whether a construction in or over a stream is an obstruction to its navigation and what works are required for increasing its navigability is conclusive, the court went on to say with regard to the claim that, under the circumstances of the instant case, the works which the Government had provided for resulted in the conservation of the water flow and thus in the provision of water power which it was proposed to use for commercial purposes, and that this amounted to a taking of private property for commercial uses and not for the improvement of navigation: "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of Government. The practice is not unusual in respect to similar public works constructed by State governments."<sup>17</sup>

In *Economy Light & Power Co. v. United States*<sup>18</sup> the court said: "We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the States is within the power of Congress to preserve for future transportation, even though it be not at present used for

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<sup>16</sup> 229 U. S. 53.

<sup>17</sup> Citing *Kaukauna Water Power Co. v. Green Bay and M. Canal Co.* (142 U. S. 254).

<sup>18</sup> 256 U. S. 113.

such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. . . .

" . . . Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of Federal control to make them again important avenues of commerce among the states. If they are to be abandoned, it is for Congress, not the courts, so to declare." <sup>19</sup>

In *United States v. Holt State Bank* <sup>20</sup> it was declared that the navigability or non-navigability of a stream is to be determined not according to any rule prevailing in a State but according to general rules recognized and applied in the Federal courts. In this case it was also declared that lands underlying navigable waters within a State, though belonging to the State in its sovereign capacity, are subject to the paramount power of Congress to control for purposes of navigation, and also to any rights which, before the creation of the State, the United States may have granted by way of performing international obligations or of carrying out any other public purposes.

### § 862. Canals.

In later cases the admiralty jurisdiction of the United States has been construed to extend to cases arising on canals. <sup>21</sup>

In the first of these cases it was held that the canals are navigable waters within the meaning of admiralty law; in the latter that canal-boats are ships or vessels within the meaning of the same law. In the latter case the court said: "The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are wholly within the limits of a particular State. We fail to see, however, that this creates any distinction in principle. . . . If it be once conceded . . . that navigable canals used as highways for interstate or foreign commerce are navigable waters of the United States, it would be an anomaly to hold that such jurisdiction did not extend to the only craft used in navigating such canals." As regards the argument that admiralty jurisdiction should not attach for the reason that the canal-boats are drawn by mules or horses walking on land, the court said: "This . . . is an argument which

<sup>19</sup> See also *New Jersey v. Sargent* (269 U. S. 328); and *United States v. Holt State Bank* (270 U. S. 49).

<sup>20</sup> 270 U. S. 49.

<sup>21</sup> *Ex parte Boyer* (109 U. S. 629); and *Perry v. Haines, sub nom. The Robert W. Parsons* (191 U. S. 17).



appeals less to the reason than to the imagination. So long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion, which may vary in the course of the same voyage, or with new discoveries made in the art of navigation."

### § 863. Dry Docks.

It has been held that repairs made to, or injuries sustained by, a ship while in dry dock are maritime in character, and that this is so even when all water has been removed from the dry dock.<sup>22</sup> However, a dry dock itself, not being used for purposes of navigation, is not a subject of salvage service or of admiralty jurisdiction.<sup>23</sup> It would appear, however, that a dry dock habitually moved from port to port would be subject to admiralty jurisdiction. In the *Cope* case, referred to in the footnote, the dock was intended to be permanently moored but had accidentally broken loose.

### § 864. Admiralty Jurisdiction Does Not Carry with it General Political Jurisdiction over Navigable Waters.

It has been held in an unbroken line of cases that the grant to the United States of admiralty jurisdiction does not, in itself, carry with it any general or political jurisdiction. That is to say, unless Congress has expressly so legislated, the State courts still have exclusive cognizance of crimes committed upon their navigable waters, and upon the sea within a marine league of the shore. In the leading case of *United States v. Bevans*<sup>24</sup> Marshall pointed out that the delegation to the Federal judiciary carries with it, indeed, a legislative power to render that jurisdiction effective, but it does not operate to take the navigable and territorial waters of a State from without the general jurisdiction of the State in the manner that districts purchased by the Federal Government, with the consent of the legislature of a State, for the erection of forts, arsenals, etc., are so removed. In his opinion Marshall said: "In describing the judicial power the framers of our Constitution had not in view any cession of territory; or, which is essentially the same, of general jurisdiction. It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a part of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts."<sup>25</sup>

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<sup>22</sup> *Simmons v. The Jefferson* (215 U. S. 130).

<sup>23</sup> *Cope v. Vallette Dry Dock Co.* (119 U. S. 625).

<sup>24</sup> 3 Wh. 336.

<sup>25</sup> For a later affirmance of this doctrine, see *Manchester v. Massachusetts* (139 U. S. 240).

### § 865. Admiralty Courts.

During the colonial period admiralty jurisdiction in this country was exercised by vice-admiralty courts created by commissions from the British High Court of Admiralty, authority being given to the colonial authorities by their charters to establish these tribunals. After the Declaration of Independence, however, each of the States, in the exercise of their several sovereignties, established admiralty courts with varying powers. In 1777 Congress appointed a standing committee to entertain appeals from the State courts in cases of maritime prizes. Under the Articles of Confederation there was established by Congress a "Court of Appeals in cases of Capture," to which appeals might be taken from the State admiralty courts.

Under the present Constitution admiralty jurisdiction is wholly withdrawn from the States and vested exclusively in the Federal courts.

By the Judiciary Act of 1789 this jurisdiction was vested in the District Courts, where it has since remained.

Section 711 of the Revised Statutes provides that the District Courts shall have jurisdiction: "Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

In all prize cases an appeal lies direct from the district to the Supreme Court. In other cases an appeal lies to the Circuit Court of Appeals.

### § 866. Legislative Powers of Congress Flowing from Admiralty and Maritime Jurisdiction.

In *The Lottawanna* case it was pointed out that the general doctrines of maritime law as they are to be deduced from the practice of civilized nations, from the decisions of their courts, and from the comments of scientific writers, are, in the absence of congressional statute to the contrary, to guide the Federal courts in the administration of their admiralty jurisdiction.<sup>26</sup>

The Constitution does not in express terms confer upon Congress the power to supplement or alter by statute this general maritime law, but the grant to the judiciary of jurisdiction over all cases of admiralty and maritime jurisdiction, a jurisdiction which has, as we have seen, been held to be exclusive—has been construed to give to the Federal legislature a power over the law which the Federal courts are thus called upon to interpret and apply. In *The Lottawanna* case, the court said: "It is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. . . . Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications

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<sup>26</sup> 21 Wall. 558.

and qualifications as it sees fit. . . . To ascertain, therefore, what the maritime law of the country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have formed; but we must have regard to our own legal history, Constitution, legislation, usages, and adjudications, as well."

In this case the court seemed to indicate that the authority of Congress to legislate with reference to matters of maritime interest is derived from its control of commerce, which includes navigation between the States, and between the United States and foreign States. But in later cases Congress was explicitly recognized to have a legislative power flowing directly from the grant to the Federal courts of admiralty and maritime jurisdiction. In *Ex parte Garnett* <sup>27</sup> the court said: "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several States, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendment is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends." <sup>28</sup>

So also, in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* <sup>29</sup> the court said: "As the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the State legislature." <sup>30</sup> But, as to this, see §§ 868, 869.

In *United States v. Thompson (The Western Maid)* <sup>31</sup> the court with reference to the binding force, *ex proprio vigore*, of general admiralty law, said: "We must realize that, however ancient may be the traditions of maritime laws, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been adopted by the United States. There is no mystic overlaw to which the United States must bow. When a case is said to be governed by foreign

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<sup>27</sup> 141 U. S. 1.

<sup>28</sup> Citing *Butler v. Boston & S. S. S. Co.* (130 U. S. 527); *Norwich, etc., v. Wright* (13 Wall. 104); *The Lottawanna* (21 Wall. 558); *The Scotland* (105 U. S. 24); *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* (109 U. S. 578).

<sup>29</sup> 109 U. S. 578.

<sup>30</sup> It is to be remarked that during the early period the power of Congress to legislate with reference to maritime matters was drawn from the Commerce Clause, which had been held to give Federal control of navigation between the States and with foreign powers, and it was only later when the admiralty jurisdiction had been construed to extend to all public navigable waters, that the grant of judicial control over admiralty and maritime matters was resorted to as a broader source of Federal control.

<sup>31</sup> 257 U. S. 419.

law or by general maritime law, that is only a short way of saying that, for this purpose, the sovereign power takes up a rule suggested from without, and makes it part of its own rules.”<sup>32</sup>

### § 867. The Determination of the Sphere of Admiralty Jurisdiction a Judicial Question.

Though, as appears from the foregoing, Congress, and to a certain extent the State legislatures as well, have the power to fix the substantive law which the Federal admiralty courts are to apply, it is not within the power of these law-making bodies to determine the sphere of admiralty jurisdiction. This, it has been held, is a purely judicial function. In *The St. Lawrence*<sup>33</sup> Taney declared: “Certainly no State law can enlarge the admiralty jurisdiction nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.” And in *The Lottawanna* case, Justice Bradley said: “The question as to the true limits of maritime law and maritime jurisdiction, is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is, within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the usages of this country, and on such legislation as may have been competent to affect it.”<sup>34</sup>

From the adoption of the principle that, from the grant of judicial power over matters of admiralty and maritime jurisdiction, a Federal legislative

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<sup>32</sup> Citing *The Lottawanna* (21 Wall. 558); *Dalrymple v. Dalrymple* (2 Hagg. Consist. Rep. 54); Dicey, *Conf. of Laws*, 2d ed. 6. The court added: “Also, we must realize that the authority that makes the law is itself superior to it, and that, if it consents to apply to itself the rules that it applies to others, the consent is free and may be withheld. The sovereign does not create justice in an ethical sense, to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is a question of power, and no human power is unlimited. *Carino v. Philippine Islands*, 212 U. S. 449. But from the necessary point of view of the sovereign and its organs, whatever is enforced by it as law is enforced as the expression of its will. *Kawanakoa v. Polyblank*, 205 U. S. 349.”

The author would accept the foregoing political or legal theory except the statement that sovereignty is a question of power. He would prefer to substitute for this the statement that sovereignty is a matter of jurisdiction and that the effective exercise of jurisdiction is a matter of human power or might which is never unlimited. Cf. the author's *Fundamental Concepts of Public Law*, Chaps. VIII, IX, X.

<sup>33</sup> 1 Black, 522.

<sup>34</sup> In the Limited Liability Act of 1851, and the Harter Act of 1893, Congress has materially altered maritime liabilities as determined by general maritime jurisprudence.

power is to be deduced is not to be drawn the more general rule that in all cases where Federal judicial power is granted, Congress may provide the law which is to be applied in the exercise of that jurisdiction. Thus, for example, such a legislative power is not implied where the judicial power is based, not upon the subject-matter in suit, but upon the character of the parties litigant.

As is elsewhere shown, in suits between the States, the Supreme Court from necessity finds itself obliged to determine the law applicable, which law may not be exactly the law of either of the States; so also, in suits between citizens of different States, for reasons which have been stated, the law of the States, at least as interpreted by their respective courts, is not always followed, but there has never been a suggestion that Congress might enact the law to be applied. Relations between the States of the Union being of a *quasi*-international character, it is eminently proper that, when necessary, general principles of jurisprudence should be applied. And where, in suits between citizens of different States, the Federal courts do not hold themselves concluded by the decisions of the State courts, it is not upon the ground that Federal law as distinct from State law is to be applied, but upon the doctrine that, as independent tribunals, the Federal courts have a right, coördinate with that of the State courts, to determine what the State law is.

In the case of admiralty and maritime causes, however, the condition is quite otherwise. Here the State courts have absolutely no jurisdiction. The general principles of the law to be applied are indeed furnished by the admiralty law of the world. But it is necessary that this body of general principles should be subject to change and addition by the legislatures of each country, and, as the Supreme Court has said, it would be indeed a strange and undesirable condition of affairs to have this legislation supplied by governments whose courts have no jurisdiction to apply it.

The legislative powers of Congress thus follow *ex necessitate*.

#### § 868. State Legislative Powers with Reference to Admiralty Matters.

It will be observed that the act vesting admiralty jurisdiction in the district courts saves to suitors, in all cases, their right to a common-law remedy, where that law is competent to give it. The effect of this provision is not to permit the State courts to exercise in any way admiralty jurisdiction, but to give to the suitor the option of pursuing in those courts any common-law right that he may have.<sup>35</sup>

But in no case may a State court entertain a suit in the nature of an admiralty proceeding, that is, a proceeding *in rem* against a vessel. This was conclusively determined in *The Moses Taylor* <sup>36</sup> and in *Hine v. Trevor*.<sup>37</sup>

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<sup>35</sup> *Sherlock v. Alling* (93 U. S. 99).

<sup>36</sup> 4 Wall. 411.

<sup>37</sup> 4 Wall. 555.

However, the State courts may proceed *in rem* against vessels in non-maritime causes of action.

It is to be observed that when a party avails himself of the "saving clause" and seeks a common-law remedy, the rights and obligations involved are to be measured by the rules of maritime law. Thus, in *Chelentis v. Luckenbach Steamship Co.*<sup>38</sup> we find the court saying: "The distinction between rights and remedies is fundamental. . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he may ask relief, petitioner's rights were those recognized by the law of the sea."<sup>39</sup>

In *Red Cross Line v. Atlantic Fruit Co.*<sup>40</sup> attention was again called to the doctrine that the statutory provision which saves to suitors common-law relief where that law is competent to give it, does not permit the States to make changes in the substantive admiralty law, but that "it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law."

In this case the State law involved was one providing for the enforcement of executory agreements to arbitrate. As to this act the court said: "The Arbitration Act deals merely with the remedy in the State courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to modify the substantive maritime law or to deal with the remedy in courts of admiralty."

In *Union Fish Co. v. Erickson*<sup>41</sup> it was held that an action in admiralty by the master of a vessel for the breach of a contract between him and the owner of the vessel could not be defeated by the application of a Statute of Frauds of the State in which the action was brought. This holding was based, not upon the proposition that the statute attempted to modify the substantive maritime law, but because it attempted to modify the remedial law of the admiralty courts.<sup>42</sup>

<sup>38</sup> 247 U. S. 372.

<sup>39</sup> *Cf. Robins Dry Dock Co. v. Dahl* (266 U. S. 449).

<sup>40</sup> 264 U. S. 109.

<sup>41</sup> 248 U. S. 308.

<sup>42</sup> See statement to this effect in *Red Cross Line v. Atlantic Fruit Co.* (264 U. S. 109).

**§ 869. States May Create Rights which the Admiralty Courts Will Enforce.**

But, though the State courts may not exercise admiralty jurisdiction, it has been held that the State legislatures may by statute create maritime rights, which the Federal district courts, sitting as admiralty tribunals, will enforce. In other words, the State law-making body may create rights which the State courts may not enforce, by admiralty proceedings, that is, *in rem* against the vessel, but which the Federal courts may.<sup>43</sup>

In *The Lottawanna* case the court said: "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessities to a vessel in her home port may be regulated in each State by State legislation. State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the State courts so far as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by State laws."

The court went on to admit that this is a somewhat anomalous practice, but in justification said: "The practice . . . has existed from the origin of the government and, perhaps, was originally superinduced by the fact that prior to the adoption of the Constitution, liens of this sort created by State laws had been enforced by State courts of admiralty; and, as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the State court was transferred to the District Court, it was natural, in the infancy of Federal legislation in commercial subjects, for the latter courts to entertain jurisdiction over the same class of cases, in every respect, as the State courts had done, without due regard to the new relations which the States had assumed toward the maritime law and admiralty jurisdiction."

In *Butler v. Boston Steamship Co.*<sup>44</sup> a limitation upon the power of the States to create maritime liens which the Federal courts will recognize and enforce was suggested, though not definitely declared. In that case Justice Bradley, after applying an act of Congress in modification of the Federal maritime law, and with reference to a cause arising within the territorial limits of a State, said: "It might be a much more serious question whether a State law can have force to create a liability in a maritime case

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<sup>43</sup> *The Lottawanna* (21 Wall. 558); and *The Glide* (167 U. S. 606).

<sup>44</sup> 130 U. S. 527.

at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such a liability. On this subject we prefer not to express an opinion." However, in *Old Dominion S. S. Co. v. Gilmore*,<sup>45</sup> as in other cases, the foregoing doubt has been held to be without good foundation, and liabilities created by State statutes for injuries resulting in death upon the high seas have been enforced by the Federal courts sitting in admiralty, by proceedings *in rem*.

The Supreme Court has held that until Congress acts on the subject a State may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas and not within the territory of any other sovereign, and that where a fund is being distributed in a proceeding to limit the liability of the owners of a vessel all claims to which the admiralty does not deny existence must be recognized whether admiralty liens or not. In this case the vessel belonged to a Delaware corporation. The law of Delaware gave damages for death caused by a tort. The vessel was in collision with another vessel belonging also to a Delaware corporation. It was held that claim against the owner of one of the vessels in fault for such death could be enforced in a proceeding in the admiralty brought by such owner to limit its liability.<sup>46</sup>

#### § 870. State Workman's Compensation, and Employers' Liability Acts as Applied to Admiralty Causes.<sup>47</sup>

In *Southern Pacific Co. v. Jensen*,<sup>48</sup> the Supreme Court, by a five to four divided court, held unconstitutional a Workman's Compensation Act of the State of New York in so far as made applicable to employees whose work was maritime in nature. This decision came as a surprise to many for there was involved in the case no attempt upon the part of the State to enforce a right or liability in a suit in the nature of an admiralty proceeding.

In this case a stevedore, Jensen, had been accidentally killed while working on a ship moored to a pier in the North River, New York (that is, in navigable waters of the United States), and compensation under the New York Compensation Act had been awarded his wife. The validity of this award was contested by the steamship company and the award sustained by the State courts. Upon appeal to the Supreme Court of the United States this decision of the State courts was reversed, it being held, as has been said, that the State law could not constitutionally be applied to employees whose work was maritime in character. The court recognized that,

<sup>45</sup> 207 U. S. 398.

<sup>46</sup> *The Hamilton* (207 U. S. 398).

<sup>47</sup> See generally, upon this subject, E. T. Fell's *Recent Problems in Admiralty Jurisdiction*, XL Johns Hopkins University Studies in Historical and Political Science, 1922.

<sup>48</sup> 244 U. S. 205.



in the absence of congressional action, the general maritime law might be affected by State legislation in certain respects, in much the same way that it was recognized that interstate commerce might, in the absence of Federal legislation, be affected, but, said the court: "We think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. . . . If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. . . . Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." <sup>49</sup>

In *Chelentis v. Luckenbach S. S. Co.*,<sup>50</sup> the doctrine of the *Jensen* case was again examined and approved.

In *Union Fish Co. v. Erektion*,<sup>51</sup> it was held that a right of action upon a contract maritime in its nature, for its breach could not be defeated, because not in writing as required by a State statute. The court said: "The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made."

In order to overcome the effect of the holding of the court in *Southern Pacific Co. v. Jensen*, Congress, by act of October 6, 1917,<sup>52</sup> amended Sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under State workmen's compensation acts. This act of Congress the Supreme Court held to be unconstitutional in *Knickerbocker Ice Co. v. Stewart*,<sup>53</sup> as an attempt to give to the States a legislative authority with reference to a field that, by the Federal Constitution, had been vested exclusively

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<sup>49</sup> The court added that the State statute was inconsistent with the policy of Congress, as manifested in a number of acts (which were cited), to encourage investments in ships.

<sup>50</sup> 247 U. S. 372.

<sup>51</sup> 248 U. S. 308.

<sup>52</sup> 40 Stat. at L. 395.

<sup>53</sup> 253 U. S. 149.

in the General Government. The court, after reviewing its more recent decisions, said:

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

"Since the beginning Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. . . . Having regard to all these things, we conclude that Congress undertook to permit application of workmen's compensation laws of the several States to injuries within the admiralty and maritime jurisdiction, and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. . . . And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed, except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant.

“ . . . Congress cannot transfer its legislative power to the States—by nature this is non-delegable.”<sup>54</sup>

In *Western Fuel Co. v. Garcia*,<sup>55</sup> the court held that the doctrine of *Southern Pacific Co. v. Jensen*<sup>56</sup> did not apply to a State statute which gave a right of action on account of death resulting from a maritime tort committed on navigable waters, and that, therefore, the admiralty courts might entertain a libel *in personam* for damages sustained by those to whom such right was given by the State statute, because, as the court said, “the subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony of that law in its international and interstate relations.”<sup>57</sup>

In *Grant-Smith-Porter Ship Co. v. Rohde*,<sup>58</sup> it was held that a State compensation act might apply to the accidental injury of a carpenter working upon an uncompleted vessel lying upon the navigable waters of the State, and that the remedy provided for by the act being an exclusive one, the right to recover damages in an admiralty court, which otherwise might have existed, was abrogated. The court declared that the contract for constructing the ship was in itself, that is, apart from the place where performed, non-maritime in character, in that Rohde’s general employment, and his activities at the time of the accident, had no direct relation to navigation or commerce. The court said: “The injury was suffered within a State whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. . . . Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime laws, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.”<sup>59</sup>

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<sup>54</sup> Citing *In re Rahrer* (140 U. S. 545); *Field v. Clark* (143 U. S. 649); *Buttfield v. Stranahan* (192 U. S. 470); *Butte City Water Co. v. Baker* (196 U. S. 119); *Interstate Com. Com. v. Goodrich Transit Co.* (224 U. S. 214).

<sup>55</sup> 257 U. S. 233.

<sup>56</sup> 244 U. S. 205.

<sup>57</sup> See also *Grant-Smith-Porter Ship Co. v. Rohde* (257 U. S. 469); and *State Industrial Commission v. Nordenholt Corp.* (259 U. S. 263), in which State laws were held not to interfere unduly with the general maritime law recognized by the admiralty courts.

<sup>58</sup> 257 U. S. 469.

<sup>59</sup> Cf. *Miller’s Indemnity Underwriters v. Brand* (270 U. S. 59); *Rosengrant v. Havard* (273 U. S. 664).

To meet the Knickerbocker case, Congress, by act of June 10, 1922,<sup>60</sup> declared that masters of vessels and members of their crews should be excluded from those who might claim under State acts compensation for maritime injuries. It was hoped that thus these States acts might be made effective for at least stevedores, repairmen, etc. However, this act also was held unconstitutional by the court in *Washington v. Dawson and Industrial Accident Com. of California v. James Ralph Co.*<sup>61</sup> The court, after reviewing decisions subsequent to *Southern Pacific Co. v. Jensen* and finding in them no departure from the doctrine of that case, said that the instant case, upon the contrary, manifested a purpose to permit the States to alter the general maritime law and thereby to introduce conflicting requirements—to prevent which had been the purpose of the Constitution when it adopted the law of the sea as the measure of maritime rights and obligations.

### § 871. Longshoremen's and Harbor Workers' Compensation Act.

In a further effort to meet the situation created by the decisions of the court in *Southern Pacific Co. v. Jensen*, *Knickerbocker Ice Co. v. Stewart*, and *Washington v. Dawson*, Congress, in 1927, enacted the Longshoremen's and Harbor Workers' Compensation Act.<sup>62</sup>

This act, which is an elaborate and detailed one, provides accident compensation for longshoremen and harbor workers who, the court held, were not and could not be covered by State compensation acts.<sup>63</sup> The act declares: "Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceeding may not validly be provided by State law."

In general, the administration of the act is placed in the hands of the United States Employees' Compensation Commission.

No decisions of the Supreme Court arising directly under this act have been made. It will, however, be observed that, granting the constitutionality of the act (regarding which there can be no reasonable doubt), the courts will continue to be confronted with the problem of determining in specific instances whether claimants have or have not suffered from maritime torts and whether or not, even if the torts may be held to be maritime in character, the circumstances permit State compensation acts constitutionally to apply. For, as has appeared in the cases of *Western Fuel Co. v. Garcia*,<sup>64</sup> *Grant-Smith-Porter Ship Co. v. Rohde*,<sup>65</sup> and *Red Cross Line v.*

<sup>60</sup> 42 Stat. at L. 634.

<sup>61</sup> 264 U. S. 219.

<sup>62</sup> 44 Stat. at L. 1424.

<sup>63</sup> Masters or members of crews of, and persons engaged by the master to load, unload or repair, vessels under eighteen tons net are not included.

<sup>64</sup> 257 U. S. 233.

<sup>65</sup> 257 U. S. 469.

Atlantic Fruit Co.<sup>66</sup> there may be cases in which State laws may apply even though the accidents, by reason of the places where they occur, might, at the option of the plaintiffs, be brought in the admiralty courts.<sup>67</sup>

### § 872. Jurisdiction over Foreign Merchant Vessels.

The jurisdiction of the United States over private or merchant vessels when within American ports or harbors or territorial waters comes fairly within the admiralty and maritime jurisdiction of the Federal Government, but the principles governing its exercise are determined by the doctrines of general international law and of international comity rather than by those peculiar to American constitutional jurisprudence. Therefore, they do not need special consideration in the present chapter.<sup>68</sup>

In *The Pesaro* <sup>69</sup> it was declared that the question whether a vessel arrested on process in libel *in rem* was exempt from such arrest because owned by a foreign government depended upon whether there is an implied exception of such vessels from the operation of Section 24, clause 3, of the Judicial Code giving to the District Courts original jurisdiction of admiralty causes. The Supreme Court held that it had jurisdiction to entertain the appeal from the District Court, under Section 238 of the Judicial Code, the question being a jurisdictional one, but held that the status of the vessel as the property of a foreign government had not been effectively raised in the court below, since there had been there only a suggestion made directly to the court by the Ambassador of the foreign State together with a certificate of the American Secretary of State that the Ambassador was the duly accredited representative of the foreign State. The Supreme Court pointed out that this suggestion should have been made to the court below through an official channel of the United States.

In *Berizzi Bros. Co. v. Steamship Pesaro*,<sup>70</sup> the status of the vessel having been properly raised, the court held the ship to be immune from arrest.<sup>71</sup>

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<sup>66</sup> 264 U. S. 109.

<sup>67</sup> See the able article by M. J. Conten, "Ten Years of the Jensen Case" in 76 *Univ. of Penna. Law Review*, 926.

<sup>68</sup> For an examination of this general subject see Fell's *Recent Problems in Admiralty Jurisdiction*, Chapter III. Important instances of Federal legislation affecting foreign merchant or private vessels in American harbors are the Seaman's Act of December 17, 1898 (30 Stat. at L. 755, 763), and the Seaman's Act of March 4, 1915 (38 Stat. at L. 1164). As to the application of the National Prohibition Act (41 Stat. at L. 305) to foreign vessels in United States ports or territorial waters, see *Cunard S. S. Co. v. Mellon* (262 U. S. 100).

<sup>69</sup> 235 U. S. 216.

<sup>70</sup> 271 U. S. 562.

<sup>71</sup> At the hearing it was stipulated that the vessel, when arrested, was owned, possessed and controlled by the Italian Government, was not connected with its naval or military powers, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries including the port of New York, and was so employed

For a further discussion of this subject, see Chapter LXXVIII dealing with the suability of the United States.

**§ 873. Actions In Rem against Merchant Vessels Owned, Leased, Chartered or Requisitioned and Operated by the United States Government.**

The extent to which, during recent years, merchant ships have been owned or leased or chartered and operated by the United States Government has made very important the question as to the extent to which such ships may be proceeded against in admiralty by private parties; that is, the extent to which it is proper that the courts should refuse to entertain such suits on the ground that they are suits against the United States. This subject also will receive consideration in Chapter LXXVII which deals with the suability of the United States.<sup>72</sup>

**§ 874. Jurisdiction on the High Seas.**

The right of the United States to exercise jurisdiction over American vessels on the high seas is included within the Federal admiralty and maritime jurisdiction, but it can no doubt be also derived from the general international rights of the United States as a sovereign power. As to the criminal side of this jurisdiction, it is to be noted that the Constitution expressly grants to Congress the power "to define and punish piracies and felonies committed on the high seas."<sup>73</sup> Under this express grant it is possible for the United States to take jurisdiction of piracies committed by foreigners on foreign vessels on the high seas.<sup>74</sup>

As to the right of the United States under international law, or under its constitutionally granted admiralty and maritime jurisdiction, to punish offences committed by American citizens on foreign vessels on the high seas or even in foreign harbors there would seem to be no doubt. The fact of American citizenship brings the individual within American jurisdiction, and the fact that the offence is committed on navigable waters brings him within the Federal admiralty jurisdiction.<sup>75</sup>

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in the service and interest of the whole Italian nation, as distinguished from any individual member thereof, private or official, and that the Italian Government had never consented that its vessel be seized or proceeded against by judicial process.

<sup>72</sup> See § 916.

<sup>73</sup> Art. I, Sec. 8, Cl. 10.

<sup>74</sup> *United States v. Lewis* (36 Fed. Rep. 449); *United States v. Palmer* (3 Wh. 630). In this last case Chief Justice Marshall said: "The Constitution having conferred on Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law?"

<sup>75</sup> As to the right of a State to take cognizance of, and exercise jurisdiction with reference to, the acts of its citizens wherever they may be, see the author's *Fundamental Concepts of Public Law*, pp. 400 *et seq.*

## CHAPTER LXXXV

### SUITS BETWEEN STATES OF THE UNION <sup>1</sup>

#### § 875. Constitutional Provisions.

Article III of the Constitution provides that the judicial power of the United States shall extend "to controversies between two or more States." During the colonial period disputes between the colonies, especially those in relation to boundaries, had been settled in the English courts. Thus, for example, Mason and Dixon's Line was thus established.<sup>2</sup> Other inter-colonial disputes were settled by the British Privy Council; for example, between Massachusetts and New Hampshire and New York in 1764.<sup>3</sup>

Under the Articles of Confederation, it had been provided that "The United States, in Congress assembled, shall . . . be the last resort, on appeal, in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever."

This jurisdiction, the Articles went on to provide, should be exercised by Congress by the appointment for each case of a special tribunal whose decision should be final and conclusive. Under the power thus granted a number of intercolonial disputes were presented. Two of these (between Massachusetts and New York, and South Carolina and Georgia) were settled by compromise out of court. A third, between Pennsylvania and Connecticut, resulted in the confirmation to Pennsylvania of the Wyoming region.<sup>4</sup> Upon the whole, however, it would appear that this mode of settlement of disputes between the colonies proved by no means effective,

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<sup>1</sup> Dr. James Brown Scott, under the title *Judicial Settlement of Controversies between States of the American Union* (2 vols., Carnegie Endowment for International Peace, 1918) has compiled and published *in extenso*, all the opinions of the Supreme Court in suits between States, as well as opinions in other cases dealing more or less directly with the constitutional status of the States in the Union and their amenability to judicial process,—such, for example, as the nature and extent of the Federal judicial power, and suits by individuals against States. Dr. Scott has also published another volume entitled *Judicial Settlement of Controversies between States of the American Union. An Analysis* (Carnegie Endowment for International Peace, 1919) in which he has subjected to analysis and explanation the eighty or more cases in which the Supreme Court, up to the time of his writing, had entertained suits between States of the Union. Attention should also be drawn to the small volume *The Supreme Court and Sovereign States* (Princeton University Press, 1924) by Mr. Charles Warren, formerly Assistant Attorney General of the United States.

<sup>2</sup> Penn. v. Baltimore (1 Vesey, 44).

<sup>3</sup> Cf. Story, *Commentaries on the United States Constitution*, § 1675.

<sup>4</sup> Jameson, *Essays in Constitutional History*, Chapter I.

for in *Rhode Island v. Massachusetts* <sup>5</sup> we find Justice Baldwin in his opinion saying: "It is a part of the public history of the United States of which we cannot be judicially ignorant, that at the adoption of the Constitution there were existing controversies between eleven States respecting their boundaries, which arose under their respective charters and had continued from the first settlement of the colonies."

### § 876. Boundary Disputes.

The most important class of cases which have required the exercise of the authority granted to the Supreme Court to adjudicate between States have been those relating to disputed boundaries.

The first of these was that of *New Jersey v. New York*. <sup>6</sup> In his opinion awarding the process of subpoena, Chief Justice Marshall, after reciting the constitutional grant of judicial power, and referring to previous suits to which States had been parties and which had been entertained by the Supreme Court, said: "It has then been settled by our predecessors on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." The Chief Justice went on to observe that should a defendant State, after due service of process, fail to appear (and, it was to be remarked that there was no means whereby a State might be compelled to appear in a suit brought against it) the complainant had the right to proceed *ex parte* to a final judgment.

The second boundary dispute between States brought before the Supreme Court was between *Rhode Island and Massachusetts*. <sup>7</sup> This suit was brought in 1832, but was not finally determined until 1838. In this case it was strenuously urged that the consent which the States, by the adoption of the Constitution, had given for the entertainment by the Supreme Court of suits between themselves, extended only to matters ordinarily judicially cognizable, and that it did not extend to suits of a political character, such as was a dispute regarding boundaries. <sup>8</sup>

Justice Baldwin rendered the prevailing opinion of the court. After calling attention to the rule that in the construction of the Constitution the state of things existing at the time of its framing and adoption was to be considered, he said: "With the full knowledge that there were at its adoption, not only existing controversies between two States singly, but between one State and two others, we find the words of the Constitution applicable to this state of things, 'controversies between two or more States.' It is not known that there were any such controversies then existing, other than those which relate to boundary, and it would be

<sup>5</sup> 12 Pet. 657.

<sup>6</sup> 5 Pet. 284.

<sup>7</sup> *Rhode Island v. Massachusetts* (12 Pet. 657).

<sup>8</sup> The Constitution does not in terms extend the Federal judicial power to *all* cases between States.



a most forced construction to hold that these were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on the other subjects. This becomes the more apparent when we consider the context and those parts of the Constitution which bear directly on the boundaries of States, by which it is evident that there remained no power in the contending States to settle a controverted boundary between themselves, as States competent to act by their own authority on the subject-matter, or in any department of the government, if it was not in this."

After calling attention to the fact that by the Constitution the States were expressly prohibited from entering into any agreement or compact between themselves, save with the consent of Congress, and that this clause had been already held by the States, by Congress, and by the court to include agreements with reference to boundaries, Justice Baldwin declared that every reason would lead to the same construction of the grant to the Federal courts of judicial power. "Controversies about boundary," he said, "are more serious in their consequences upon the contending States, and their relations to the Union and governments, than compacts and agreements. If the Constitution has given to no department the power to settle them they must remain interminable; and as the large and powerful States can take possession to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power, and the possession of the large States must consequently be peaceable and uninterrupted, prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by prohibitions of the Constitution, a complaining State can neither treat, agree, or fight with the adversary without the consent of Congress; a resort to judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies can be settled by compact. There can be but two tribunals under the Constitution who can act on the boundaries of States, the legislative or the judicial power; and the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the States, and as the latter can be exercised only by this court, when a State is a party, the power is here or cannot exist." There then followed, in the opinion, a careful examination of English and earlier American precedents to show that boundary disputes were not, in their nature, outside the scope of judicial power.<sup>9</sup>

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<sup>9</sup> A dissenting opinion was filed by Justice Taney.

In *Florida v. Georgia*,<sup>10</sup> *Missouri v. Iowa*,<sup>11</sup> *Florida v. Georgia*,<sup>12</sup> *Alabama v. Georgia*,<sup>13</sup> *Virginia v. West Virginia*,<sup>14</sup> *South Carolina v. Georgia*,<sup>15</sup> *Indiana v. Kentucky*,<sup>16</sup> *Virginia v. Tennessee*,<sup>17</sup> *Iowa v. Illinois*,<sup>18</sup> and *Louisiana v. Mississippi*,<sup>19</sup> the Supreme Court has without objection assumed jurisdiction in cases involving disputes as to boundaries.<sup>20</sup> In *Virginia v. West Virginia* the attempt was again made by the defendant State to raise the question as to the judicial character of boundary controversies, but the court said, without dissent as to this point: "This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well considered cases have been decided. . . . We consider . . . the established doctrine of this court to be that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render affects the jurisdiction and sovereignty of the States which are parties to the proceedings."

Since the cases already cited there have been a considerable number of other suits between States with regard to boundaries. Among them may be mentioned *Oklahoma v. Texas*,<sup>21</sup> *Arkansas v. Tennessee*,<sup>22</sup> and *Michigan v. Wisconsin*.<sup>23</sup> In this last case it was held that long acquiescence by one State in the possession of, and exercise of political jurisdiction over, territory by another State is conclusive of the title and rightful authority of the latter State. It was also held that the actual possession of a part of a tract of territory by a State under a color of title describing a larger tract, extends the possession to the entire tract in the absence of actual adverse possession by another State.

<sup>10</sup> 11 How. 293.

<sup>11</sup> 7 How. 660.

<sup>12</sup> 17 How. 478.

<sup>13</sup> 23 How. 505.

<sup>14</sup> 11 Wall. 39.

<sup>15</sup> 93 U. S. 4.

<sup>16</sup> 136 U. S. 479.

<sup>17</sup> 158 U. S. 267.

<sup>18</sup> 202 U. S. 59.

<sup>19</sup> 202 U. S. 1.

<sup>20</sup> The cases of *Virginia v. West Virginia*, *South Carolina v. Georgia*, and *Virginia v. Tennessee* arose out of compacts made between the States.

<sup>21</sup> 256 U. S. 70. In this case the United States intervened, setting up an interest as trustee of certain Indian interests.

<sup>22</sup> 246 U. S. 158. In this case it was held that the boundary line between States separated by a navigable stream is in the middle of the navigable channel—"thalweg"—and not a line equidistant between the banks of the stream. In this case it was also held that the same rule applies between States as between private proprietors when the bed or channel of a boundary stream is changed by the natural processes of erosion and accretion, namely, that the dividing line follows the varying course of the stream; but, that in cases of sudden and radical changes where the stream leaves its old bed and forms a new one, that is, by what is known as "avulsion," the boundary line remains in the middle of what was the old channel, even though no water flows therein.

<sup>23</sup> 270 U. S. 295.

**§ 877. Maladministration of Laws of a State to Injury of Citizens of Another State Not Justiciable in a Suit between the States.**

In *Louisiana v. Texas* <sup>24</sup> complaint was made by the plaintiff State that the agents of the defendant State were administering certain quarantine laws in a manner that discriminated against citizens of the plaintiff State. To this bill demurrer was filed upon the ground, *inter alia*, that the issues presented by the bill were not between the two States, but between certain citizens of the State of Louisiana, engaged in interstate commerce, and that the State, as a State, was not interested in a proprietary or other manner, and was not, therefore, entitled to bring suit. In the opinion of the court, rendered by Chief Justice Fuller, it was said: "In order . . . to maintain jurisdiction of this bill of complaint, as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of the grievances of particular individuals.

" . . . The complaint here is not that the laws of Texas in respect to quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

"But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another.' The States cannot make war or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between States does not arise unless the action complained of is State action, and acts of State officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

"In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution."

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<sup>24</sup> 176 U. S. 1.

In the course of a concurring opinion Justice Harlan said: "But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Constitution gave this court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this court for the purpose of testing the constitutionality for local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more States,' and to controversies 'between a State and citizens of another State,' and the word 'party' in the clause declaring that this court shall have original jurisdiction of all cases 'in which a State shall be a party,' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State; but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in *New Hampshire v. Louisiana*, 108 U. S. 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring suit in its name in this court against the debtor State."

§ 878. *State as Parens Patriæ.*

It must be confessed that, in *Louisiana v. Texas*, the court took a very narrow view of the right of a State to sue as *parens patriæ*. A much more liberal view was taken in *Missouri v. Illinois*.<sup>25</sup>

In that case was raised the interesting point whether the general health and prosperity of its citizens give to a State, as such, an interest sufficiently direct to enable it to prosecute a suit for equitable relief in their behalf against another State. The case arose out of the construction, under the authority of the State of Illinois, by the Sanitary District of Chicago, of an artificial drainage canal by which large quantities of sewage were carried into and thus polluted the Mississippi river which furnishes the water supply to inhabitants of the State of Missouri.

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<sup>25</sup> 180 U. S. 208.

After an exhaustive examination of cases in which the court had entertained suits in which either plaintiff or both plaintiffs and defendants had been States, the court in their majority opinion said: "From the language, alone considered, it might be concluded that whenever and in all cases where one State may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant State, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining State, or to affect the rights of its citizens, the jurisdiction of this court would attach." But, after quoting from Marshall's opinion in *Cohens v. Virginia*,<sup>26</sup> which would seem to sustain this broad construction of the court's jurisdiction, the opinion declared: "But it must be conceded that upon further consideration, in cases arising under different states of fact, the general language used in *Cohens v. Virginia* has been, to some extent, modified." As instances of this modification, the cases of *New Hampshire v. Louisiana*, *Wisconsin v. Pelican Insurance Co.*, and *Louisiana v. Texas* were cited. But even as to these cases it was pointed out that the court did not decline jurisdiction, but, after inquiry into their nature and the character of the relief prayed for, held either that the plaintiff State was not entitled to, or at least that the Supreme Court could not grant this relief. The opinion then continued: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."

As to the case at bar, the court said: "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that if the health and comfort of the inhabitants of a State are threatened, a State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the General Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering."

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<sup>26</sup> 6 Wh. 264.

It will thus be seen that in this case the court held that, under certain circumstances, a State can invoke the original jurisdiction of the Supreme Court even though it has no direct pecuniary or proprietary interests involved, but is standing, as it were, as trustee, *parens patriæ*, or representative of a considerable portion of its citizens.<sup>27</sup>

In *Pennsylvania v. West Virginia* and *Ohio v. West* <sup>28</sup> Virginia the question was as to whether a State in behalf of itself as a large consumer of natural gas and as representative of private consumers within the State might enjoin another State from enforcing a law which, in effect, required companies handling natural gas to prefer consumers within that State to those in the complainant State receiving the gas through interstate commerce. Upholding the right of the complainant State to sue in behalf of its inhabitants, the court said: "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a sub-

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<sup>27</sup> Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice White, dissented. The dissenting opinion read:

"Controversies between the States of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences can be invoked, it must appear that the States are in direct antagonism as States. Clearly this bill makes out no such state of case.

"If, however, on the case presented, it was competent for Missouri to implead the State of Illinois the only ground on which it can be rested is to be found in the allegation that its governor was about to authorize the water to be turned into the drainage channel.

"The sanitary district was created by an act of the general assembly of Illinois, and the only authority of the State having any control or supervision over the channel is that corporation. Any other control or supervision lies with the lawmaking power of the State of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which could bind the State of Illinois or control its action.

"The governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

"Assuming that a bill could be maintained against the sanitary district in a proper case, I cannot agree that the State of Illinois would be a necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

"The act complained of is not a nuisance *per se*, and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

"In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the sanitary district, if authorized by the State of Missouri."

<sup>28</sup> 262 U. S. 553.

stantial portion of the State's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not a merely remote or ethical interest, but one which is immediate and recognized by law." <sup>29</sup>

In *Heckman v. United States* <sup>30</sup> it was held that, in view of the peculiar relations in which the United States stood to the Indians, it had a right to invoke the equity jurisdiction of the courts to cancel conveyances of allotted lands of the Indians in violation of restrictions placed by Congress on the power of alienation of such lands. Out of these peculiar relations, said the court, there arose a duty upon the part of the United States to protect the Indians, and, though the interest of the United States thus created could not be expressed in terms of money or property, it was sufficient to provide a *locus standi* for the United States in the courts. As authority for this proposition, the court referred to the case of *United States v. American Bell Telephone Co.* <sup>31</sup> in which the right of the United States to sue had been based upon its obligation to protect the public from a monopoly of a patent which had been procured by fraud. So, also, in *Re Debs*, <sup>32</sup> the court said that the United States had had the right to invoke the equity powers of the court not merely for the purpose of enjoining interference with the transportation of the mails, but for the fulfilment of a general governmental obligation. "Every government," said the court in that case, "intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. . . . The National Government, given by the Constitution power to regulate interstate commerce, has, by express statute, assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control." <sup>33</sup>

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<sup>29</sup> Citing *Missouri v. Illinois* (180 U. S. 208); *Kansas v. Colorado* (185 U. S. 125); *Georgia v. Tennessee Copper Co.* (206 U. S. 230); and *Wyoming v. Colorado* (259 U. S. 419). The following cases, relied upon by the defendant State: *New Hampshire v. Louisiana* (108 U. S. 76); *Louisiana v. Texas* (176 U. S. 1); *Kansas v. United States* (204 U. S. 331); *Oklahoma v. Atchison, T. & S. F. R. Co.* (220 U. S. 277), and *Texas v. Interstate Commerce Commission* (258 U. S. 158), were declared, as the opinions in them showed, to involve facts so widely different from those in the instant case as not to be in point.

<sup>30</sup> 224 U. S. 413.

<sup>31</sup> 128 U. S. 315.

<sup>32</sup> 158 U. S. 564.

<sup>33</sup> See also *Sanitary District of Chicago v. United States* (266 U. S. 405), in which

**§ 879. Justiciable Quasi-Sovereign Rights of the States.**

The case of *Georgia v. Tennessee Copper Co.*,<sup>34</sup> though not one between States, illustrates a further definition by the Supreme Court of what will constitute a justiciable interest upon the part of a State enabling it to seek relief by Federal judicial process. Here an injunction was granted, at the suit of the State of Georgia, to enjoin the defendant company located in the State of Tennessee from discharging noxious gases from its works over the border of the State upon the territory of the plaintiff. In its opinion the court observed that it is proper to grant relief to a State, as a *quasi*-sovereign body, under circumstances which would not warrant it in a suit between private persons. In the case at bar, the court said: "The very elements that would be relied upon in a suit between fellow citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it, capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. . . . The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois* (200 U. S. 496). But it is plain that some such demands must be recognized if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court." The court, in its opinion, then went on to make the following important observation: "Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi*-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped. The States by entering the Union, did not sink to the position of private owners, subject to one system of private law."

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it was held that the Attorney General of the United States might, without express statutory authority, institute a suit in behalf of the United States to enjoin the withdrawal of water from Lake Michigan in excess of that authorized by the Secretary of War under an act of Congress. The court said: "The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce . . . but also to carry out treaty obligations with a foreign power bordering upon some of the lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the (Great) Lakes."

<sup>34</sup> 206 U. S. 230.



In *New York v. New Jersey* <sup>35</sup> the court held that, while the State of New York might properly maintain an original suit to enjoin the defendant State and its sewage commissioners from discharging such an amount of sewage into the waters of upper New York bay as would cause a pollution of such waters to the detriment of the health, property and commercial welfare of the people of the State and City of New York, an injunction would not issue in the instant case because the injury had not been established by clear and convincing evidence. The court said: "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence." The bill of complaint of the State was therefore dismissed, but without prejudice to its renewal should the operation of the sewer of the defendant State in the future become such as to require the court's interposition.

In *North Dakota v. Minnesota*, <sup>36</sup> the court again emphasized the necessity for preponderant proof of the necessity for the exercise of its jurisdiction to control the acts of one State at the suit of another State, before it would exercise that jurisdiction. "In such action by one State against another," said the court, "the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties."

#### § 880. Suits between States to Be Dealt with in an Untechnical Manner.

In *Virginia v. West Virginia* <sup>37</sup> the court said: "The case is to be dealt with in the untechnical spirit proper for dealing with a *quasi*-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called upon to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. . . . Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits with which we proceed to deal. . . . A State is superior to the forms that it may require of its citizens." And, when another phase of the case came before it somewhat later, <sup>38</sup> the court held that, contrary to the ordinary rules of legal procedure, the State of West Virginia, after the Supreme Court had adjusted the amount due from her to the State of Virginia, might file a supplementary answer asserting the existence of credits which, if properly considered, would reduce the amount as fixed.

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<sup>35</sup> 256 U. S. 296.

<sup>36</sup> 263 U. S. 365.

<sup>37</sup> 220 U. S. 1.

<sup>38</sup> *Virginia v. West Virginia* (234 U. S. 117).

**§ 881. Irrigation Works: Kansas v. Colorado.**

In *Kansas v. Colorado*<sup>39</sup> the question was raised whether one State has the right, by the construction of its irrigation works, seriously to deplete the water supply of a river which, rising in the defendant State, by nature flows into and through the plaintiff State. The case thus involved not only the technical question of the rights of riverain States to the water of rivers flowing into and through their respective territories, but whether the conflict of interests was one justiciable in the Supreme Court. The court held that the controversy was one between the States of which the Supreme Court could take original jurisdiction.

After a review of the authorities, the court showed that the interests involved were substantial ones, ones which, as between sovereign States, would furnish sufficient ground for controversy, and that, therefore, the individual States, being unable to deal with one another, either by diplomatic negotiation, treaty, or war, the General Government must have the right to intervene. The opinion declared:

"The action complained of is State action, and not the action of State officers in abuse or excess of their powers.

"The State of Colorado contends that, as a sovereign and independent State, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign States occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent States in their relations to each other; that by the law of nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld."

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<sup>39</sup> 185 U. S. 125.

Answering this contention, the Supreme Court showed that the States, as to controversies between them, were not to be regarded as sovereign bodies under international law, but that, as co-members of the same Union they could not make reprisals upon one another, enter into diplomatic relations with one another or war upon one another, and that, therefore, under the Constitution, controversies between them must be regarded as justiciable.

The demurrer to the bill, alleging want of jurisdiction, was, therefore, overruled, without prejudice to any question, and leave to answer granted.

Coming before the Supreme Court again upon its merits,<sup>40</sup> the United States, on leave, filed a petition of intervention, asserting that the amount of the flow of water of the river in question was subject to Federal authority and control, as incidental to its duty of legislating for the reclamation of arid lands owned by it. This claim the court refused to recognize.<sup>41</sup>

As regarded the jurisdiction of the court, the opinion declared that, generally speaking, "when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the

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<sup>40</sup> *Kansas v. Colorado* (206 U. S. 46).

<sup>41</sup> After reviewing the doctrines that had been put forward by counsel for the United States, that "all powers which are national in their scope must be vested in the Congress of the United States," the court declared:

"At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But, if no such power has been granted, none can be exercised. It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of section 3 of article IV, heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties."

Having held that the original jurisdiction of the Supreme Court extended to the controversy at issue between the States of Kansas and Colorado, the court turned to a consideration of the merits of that controversy and to the law applicable thereto. As to the law to be applied the court held itself to be bound by the law of neither State, but that, as had been declared in the case when upon demurrer, "sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand." In short, in all cases where the common law of the States is not in agreement or adequate, the Supreme Court asserted its right to apply principles, drawn either from Federal or international law, and thus to build up what may properly be termed an interstate common law.<sup>42</sup>

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<sup>42</sup> Some of the States of the Union have adopted the common-law rule as to the use of the waters of a stream by riparian owners which is that every proprietor has naturally an equal right to the use of the water which flows in streams adjacent to his lands as it is accustomed to run without diminution or alteration; but that no proprietor has the right to use the water to the prejudice of the proprietor above or below him; he has no property right in the water but only to a usufruct as it flows by his lands. Other States of the Union (mainly those West of the Mississippi River and especially the Pacific States), have adopted the doctrine of prior appropriation, according to which he who first appropriates the waters of a stream for a beneficial use, has a right to them whether he be a riparian owner or not. Still other States of the Union have adopted doctrines which involve a mixed application of the common law and prior appropriation doctrines.

In *Kansas v. Colorado*, the Supreme Court, holding itself free, as appears from the quotation from its opinion cited in the text, to adopt such a rule as it might see fit, without applying explicitly and unreservedly either the common-law doctrine or that of prior appropriation, inclined toward the former doctrine, but held that the State of Colorado might not use or control the waters of the stream in question regardless of any injury or prejudice resulting thereby to the rights or interests of the inhabitants of Kansas, and that each State was entitled to an equitable apportionment of the benefits to be derived from the waters of the stream. Summing up its conclusions of fact, as a basis for the decree to be entered, the court said: "The appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation or in any other manner, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the River by Colorado continues to increase there will come a time when

In *Wyoming v. Colorado*<sup>43</sup> the court had again to consider the conflicting interests of two States in streams flowing from one into the other, and again asserted that the upper State of such a stream does not have such ownership or control of the waters flowing therein as to entitle it to divert and use them without regard to the injury or prejudice to the rights of the lower State in such waters. However, the court held that when both States had recognized and adopted the doctrine of appropriation with reference to flowing waters, rather than the common-law doctrine, the doctrine thus accepted should be applied to controversies between them with regard to their respective rights in waters of non-navigable streams flowing through both States.

**§ 882. *New Hampshire v. Louisiana and South Dakota v. North Carolina.***

The interesting cases of *New Hampshire v. Louisiana*<sup>44</sup> and *South Dakota v. North Carolina*<sup>45</sup> receive consideration in the chapter entitled *The Suability of the States*.

**§ 883. *States as Plaintiffs in Civil Suits against Individuals.***

The question as to the character of interests requisite for the institution and maintenance of suits by the States of the Union has necessarily to be considered as well when individuals have been proceeded against as when States have been the parties defendant. The case of *Georgia v. Tennessee Copper Co.*<sup>46</sup> has been spoken of in the preceding paragraphs. A few other cases will sufficiently indicate the character and extent of this branch of the Federal judicial power.

In *Pennsylvania v. Wheeling & B. Bridge Co.*<sup>47</sup> upon suit of the plaintiff State, the defendant was, by decree, ordered to remove or elevate a bridge which, under color of a Virginia statute, it was constructing, on the ground that it obstructed navigation to and from the ports of Pennsylvania, and that the State, as a State, was interested directly in having the obstruction removed.<sup>48</sup>

In *Wisconsin v. Duluth*<sup>49</sup> suit was brought to enjoin the city of Duluth from maintaining a canal which drained water from the St. Louis river, and thus injured that stream as a channel of navigation to the detriment of the interests of the citizens of the plaintiff State. The court, however, found that the United States had, as a matter of fact, assumed possession

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Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes."

<sup>43</sup> 259 U. S. 419.

<sup>44</sup> 108 U. S. 76.

<sup>45</sup> 192 U. S. 286.

<sup>46</sup> Chief Justice Taney and Justice Daniel dissented.

<sup>49</sup> 96 U. S. 379.

<sup>46</sup> 206 U. S. 230.

<sup>47</sup> 13 How. 518.

and control of the canal, and, that, this being so, the State of Wisconsin could not complain or be granted relief.

In *Wisconsin v. Pelican Insurance Co.*<sup>50</sup> was raised the very important question as to the right of a State to sue in the courts of another State of the Union, citizens or corporations of other States to recover pecuniary penalties imposed by the criminal law of the plaintiff State. The court held that the judiciary article of the Constitution did not authorize, nor did the "full faith and credit" clause compel the State courts to entertain such a suit.

This was an action brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Co., a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State as required by statute. The jurisdictional point was raised by the defendant that the judicial power of the United States, and the original jurisdiction of the Supreme Court did not extend to suits, prosecuted by a State, which, on the settled principles of public and international law, could not be entertained by the judiciary of another State, and that it was one of these settled principles of law that the courts of one country or State will not execute the penal laws of another. The Supreme Court sustained the point. After a review of authorities showing that the only cases in which the courts of the United States had entertained suits by a foreign State, were to enforce demands of a civil nature,<sup>51</sup> the opinion declared: "Notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens. . . . This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States, had been independent nations, could not have been enforced judicially, but only through the political departments of their governments."<sup>52</sup> . . . The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties. . . . The application of the rule to the courts of the several States and of the United States is not affected by the provision of the Constitution and of the Act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court

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<sup>50</sup> 127 U. S. 265.

<sup>51</sup> *The Sapphire* (11 Wall. 164); *King of Spain v. Oliver* (2 Wash. 429).

<sup>52</sup> Citing (*inter alia*) *Kentucky v. Dennison* (24 How. 66), in which was refused a mandamus to the governor of Kentucky to compel him to surrender a fugitive from justice.

within the United States as they have by law or usage in the State in which they were rendered.”

In *Mississippi v. Johnson* <sup>53</sup> and *Georgia v. Stanton* <sup>54</sup> the Supreme Court refused to grant injunctions restraining the defendants from executing in the course of their official duties, an act of Congress which was alleged unconstitutionally to affect the political rights of the State. The political rights, rights of sovereignty, the court held were not subjects within the power of the judiciary to determine and protect.

In *Texas v. White* <sup>55</sup> proprietary rights of the State were involved, and jurisdiction was assumed by the court and relief granted. So also, in *Craig v. Missouri*, <sup>56</sup> *Florida v. Anderson*, <sup>57</sup> and *Alabama v. Burr* <sup>58</sup> proprietary rights were involved, and jurisdiction exercised.

In *Oklahoma v. Atchison, T. & S. F. R. Co.* <sup>59</sup> it was held that a State had not sufficient interest, in its corporate capacity, to entitle it to bring a suit to enjoin a foreign railway company from charging more than specified rates on certain domestic shipments, the State not being itself, in its governmental capacity, engaged in the sale or transportation of the commodities involved. As to this the doctrine declared in *Louisiana v. Texas* <sup>60</sup> was held to be controlling.

In *Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co.* <sup>61</sup> it was held that the court could not take original jurisdiction at the instance of the State against persons or corporations of other States when the suit, though civil in form, was, in its essential character, one to enforce by injunction its own penal legislation. The court also pointed out, as another decisive reason why it should not entertain the suit, that a State could not invoke the court's original jurisdiction where the primary purpose was to protect its citizens generally against the violation of its laws by the corporations or persons sued,—that the provision of the Constitution extending the original jurisdiction of the court to “cases in which a State shall be a party,” is not to be interpreted as embracing suits of that kind.

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<sup>53</sup> 4 Wall. 475.

<sup>54</sup> 6 Wall. 50.

<sup>55</sup> 7 Wall. 700.

<sup>56</sup> 4 Pet. 410.

<sup>57</sup> 91 U. S. 667.

<sup>58</sup> 115 U. S. 413.

<sup>59</sup> 220 U. S. 277.

<sup>60</sup> 176 U. S. 1.

<sup>61</sup> 220 U. S. 290.

## CHAPTER LXXVI

### THE UNITED STATES OR THE STATES AS PARTIES PLAINTIFF

#### § 884. Suits between the United States and a State of the Union.

Article III of the Constitution does not, in so many words, provide for Federal jurisdiction in suits between a State and the United States, but it does extend the Federal judicial power "to controversies to which the United States shall be a party." Under this grant suits brought by the United States against individual States of the Union have been entertained and decided by the Supreme Court.

In *United States v. North Carolina* <sup>1</sup> an action of debt upon certain bonds issued by the defendant State was tried and determined upon its merits, judgment being rendered in favor of the defendant. No question of jurisdiction was discussed in the briefs of counsel or in the opinion of the court. In a later case, however, it was declared that "it did not escape the attention of the court, and the judgment would not have been rendered, except upon the theory, that this court has original jurisdiction of a suit brought by the United States against a State." <sup>2</sup>

In *United States v. Texas* <sup>3</sup> the United States again appeared as plaintiff in a suit against a State, this time with reference to a matter of boundary. Here the question of jurisdiction was raised and carefully considered. After calling attention to the fact that if a dispute as to boundary or other matters is not determinable in the Supreme Court, it is not determinable anywhere, and its settlement in case of continued disagreement must be by physical force, Justice Harlan, who delivered the opinion of the court, continued: "We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous, be more appro-

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<sup>1</sup> 136 U. S. 211.

<sup>2</sup> *United States v. Texas* (143 U. S. 621). Cf. *Columbia Law Review*, II, 283, 364, "Notes on Suits Between States," by Carmen F. Randolph.

<sup>3</sup> 143 U. S. 621.



proportionately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the State, upon questions before it to which the judicial power of the Nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State."

#### § 884a. The States May Not Sue the United States.

Only since 1902 may it be said to have been certainly determined that the Supreme Court, the United States consenting, may assume jurisdiction in suits brought by a State of the Union against the United States.

In *Chisholm v. Georgia*, Chief Justice Jay had indicated, *obiter*, that such a suit would not be entertained for the reason that the court would be without power to enforce its orders should judgment be rendered against the defendant. In *Florida v. Georgia*,<sup>4</sup> however, the United States was allowed by the court to intervene in a suit between two States, but without becoming one of the parties to the record. And in *Mississippi v. Johnson* <sup>5</sup> it was indicated that in a proper suit a bill might be filed by a State against the United States. Finally, in *Minnesota v. Hitchcock*,<sup>6</sup> decided in 1902, jurisdiction was squarely asserted. In that case it was held that a suit by a State to enjoin the Secretary of the Interior of the United States from selling certain Indian lands, was a suit against the United States with reference to a matter regarding which it had consented to be sued. "The legal title to these lands," said the court, "is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title, and vest it in the State. The United States is therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter." By statute the United States had consented to be sued in matters relating to these Indian lands. Jurisdiction was assumed by the court, and the case decided upon its merits. "This is a controversy," said the court, "to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is of course, under that clause [extending jurisdiction over controversies 'to which the United States shall be a party'] a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases

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<sup>4</sup> 11 How. 293.

<sup>5</sup> 4 Wall. 475.

<sup>6</sup> 185 U. S. 373.

in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.”

In this case counsel on neither side raised the question of the original jurisdiction of the court, being anxious, it would appear, that the case should be decided on its merits. This silence, however, Justice Brewer, who rendered the opinion of the court, declared was not sufficient in itself to give to the court such jurisdiction or to excuse the court from satisfying itself upon the point. “The silence of counsel,” said Justice Brewer, “does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter. . . . Consent may waive an objection so far as respects the person, but it cannot invest the court with a jurisdiction which it does not by law possess over the subject-matter.”

That a State may not sue the United States without its consent appeared so clear to the court in *Kansas v. United States*<sup>7</sup> as not to need argument. The court contented itself with saying: “It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.”

### § 885. Suits between a State of the Union and Foreign States or Their Citizens.

As to controversies between a State and foreign States, it may be said that no such suits have ever been brought, and one can, therefore, only speculate as to the extent of Federal judicial power under the clause of Article III of the Constitution which extends the Federal judicial power to controversies “between a State, or the citizens thereof, and foreign States, citizens, or subjects.” We do know, however, by judicial determination, that neither a “Territory,”<sup>8</sup> an Indian tribe,<sup>9</sup> nor the District of Columbia<sup>10</sup> is a “State” within the meaning of the word as used in this clause of the Constitution.

Whether or not, if a suit were brought by a foreign State, it would be entertained by the Supreme Court, is very doubtful. A foreign State could not, of course, be compelled to appear as a party defendant in such a suit, and reason would, therefore, seem to suggest that it should not be permitted to appear as a party plaintiff unless, of course, the defendant State should give its consent. Madison took this view. “I do not conceive,” he said, “that any controversy can ever be decided in these courts between an

<sup>7</sup> 204 U. S. 331.

<sup>8</sup> *Smith v. United States* (1 Wash. Ter. 269).

<sup>9</sup> *Cherokee Nation v. Georgia* (5 Pet. 1).

<sup>10</sup> *Hepburn v. Ellzey* (2 Cr. 445).

American State and a foreign State, without the consent of the parties. If they consent, provision is here made.”<sup>11</sup> Story, in his *Commentaries*, takes the same view.<sup>12</sup> On the other hand, as will be shown in the chapter dealing with The Suability of States, the Supreme Court has entertained suits brought by the United States against States of the Union, and without their consent, notwithstanding the fact that they are not permitted to sue the United States without its consent. In *Hans v. Louisiana*<sup>13</sup> is a *dictum* approving the dissenting opinion of Justice Iredell in *Chisholm v. Georgia*, according to which it was declared not to have been the intention of the framers of the Constitution to create any new remedies unknown to the law. From this it would follow that the Supreme Court could not take jurisdiction of a case between a foreign State and a State of the Union, even with the consent of both parties.<sup>14</sup>

### § 886. Foreign States May Sue Private Parties in American Courts.

There would seem to be no question but that foreign States, their rulers or their duly authorized agents, may sue private individuals or corporations in American courts, State as well as Federal. A leading case upon this subject is *The Sapphire v. Napoleon III.*<sup>15</sup>

However, the determination as to when a given government can be held to have such a status as to entitle it to sue as such is one the determination of which, in substance, lies within the authority of the political departments of the United States Government.<sup>16</sup>

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<sup>11</sup> *Eliot's Debates*, II, 391.

<sup>12</sup> § 1699.

<sup>13</sup> 134 U. S. 1.

<sup>14</sup> Upon this point see article by Carmen F. Randolph in *Columbia Law Review*, II (1902), p. 283, entitled “Notes on Suits Between States.”

<sup>15</sup> 11 Wall. 164.

<sup>16</sup> Cf. the author's *Fundamental Concepts of Public Law*, Chapter XX, “De Facto and De Jure Governments,” and Chapter XXI, “Status of Unrecognized Governments.”

## CHAPTER LXXVII

### THE SUABILITY OF STATES OF THE UNION

#### § 887. A Sovereign May Not Be Sued Without Its Consent.

That a sovereign is not subject to suit, without its consent, is a principle that has come down unchallenged since the time of Rome. It has found expression in the rule that "the sovereign can do no wrong" and has been adopted by the English common law as fully as, indeed, if anything, more fully than, by the systems of jurisprudence founded upon the Civil Law.<sup>1</sup>

Though the principle that the King can do no wrong is, as Blackstone says, "a necessary and fundamental principle of the English Constitution," the English subject aggrieved by his sovereign, is, in fact, granted redress by the use of either the "petition of right" or of the "*monstrans de droit*." The first remedy, dating from the time of Edward I, lies where the government is in full possession of hereditaments or chattels to which the claimant lays title. Upon this petition the Crown, as a matter of course, indorses *soit droit fait al partie*, whereupon the matter is determined upon issue or demurrer as in a suit between private individuals. The *monstrans de droit* was originally employed only in cases where the right of both the King and the subject appeared upon record.

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<sup>1</sup> More fully because in the Civil Law the State as *Fiscus* might be held liable for injuries done to private right. Also, some European courts have awarded damages against their governments for invasions of property rights, even where there have been made no express provision for compensation, upon the theory that the government could not have intended to infringe private rights. In America, as we shall see, unless the acts of the government or of its agents can be held unconstitutional and void, the injured individual is given no relief, and even then, in default of other express provision, his recourse is not against the State itself, but its agents who may be financially irresponsible. Where, however, provision has been made by a State for suits against itself based upon claims arising out of contract, the American courts have sometimes held that the taking of private property by a public official for the benefit of the State creates an implied contract for compensation, and have thereupon awarded damages. Thus, in *United States v. Great Falls Manufacturing Co.* (112 U. S. 645), the Supreme Court of the United States said: "We are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

Though, according to English constitutional law, the King is not subject to suit civilly or criminally, all of his agents, from the highest to the lowest, are. For any act not warranted by law that they may commit they are responsible in the ordinary court of law to private citizens affected by them, and they may not plead the command of the crown in justification of an act otherwise illegal.

In America the same principle of official responsibility applies, with, however, these exceptions. In the first place, we have no chief executive who is exempt from responsibility to law.<sup>2</sup> In the second place our legislatures, Federal and State, have limited legislative powers, especially as to the taking of life, liberty, and property without due process of law. Thus in England an official can justify, in all cases, if he can show an authority derived from an act of Parliament; in the United States, however, he must be able to point to a legislative act which can be shown to be in conformity with the conditions imposed by our written constitutions. In other respects, however, our citizens are not so favorably situated as regards claims against the State as they are in England, for the two remedies, the *Petition of Right* and the *monstrans de droit*, have not found a place in our jurisprudence. In some classes of cases, as earlier seen, the United States, and several of the States here made provision for suits against themselves. But in all other cases, the citizen, though he may hold the public officials to a strict legal responsibility, is without the right to sue the State, the principle being unreservedly accepted that the sovereignty of the State implies freedom from suit against its will.<sup>3</sup>

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<sup>2</sup> In how far the President and Governors of the States are subject to compulsory judicial process is elsewhere considered.

<sup>3</sup> In *The Federalist* (No. LXXXI) Hamilton declared: "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind." Hamilton then went on to argue that the States would continue to enjoy this exemption under the Constitution the adoption of which he was arguing. "The exemption," he said, "as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Constitution, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of the plan, be divested of the privilege of paying their own debts in their own way, free from every constraint, but that which flows from the obligation of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." Marshall and Madison in the Virginia convention which ratified the new Constitution denied that it gave to the Federal courts jurisdiction of suits that might be brought against a State by a citizen of another State (*Eliot's Debates*, III, 533, 555).

### § 888. *Chisholm v. Georgia.*

Hamilton's and Marshall's position that, under the new Constitution, the States of the Union would not be held amenable to suits brought by citizens of other States soon proved erroneous. In the case of *Chisholm v. Georgia*,<sup>4</sup> decided in 1793, it was held that, under the terms of the Federal Constitution, which provided that the judicial power of the Federal Government should extend to all cases "between a State and citizens of another State," a State might be made party defendant in a suit brought by a citizen of another State.<sup>5</sup> The non-suability of a State apart from specific constitutional provision to the contrary was admitted in this case. The only question was whether, considering the general political doctrines prevailing at the time of the adoption of the Constitution, the framers of that instrument could properly be held to have intended, by the use of the words "between a State and citizens of another State," that this derogation from the sovereignty of the States should exist. Justice Iredell argued that, under the Constitution, the Federal courts could take jurisdiction only in those cases in which a State could, according to generally accepted principles of law, be properly made a party, namely, where it appeared as plaintiff, or consented to appear as defendant. Justices Blair, Cushing and Wilson, and Chief Justice Jay, however, held that not only did the words of the Constitution include all cases in which a State was a party, whether plaintiff or defendant, but that there was nothing in the status of the States under the Constitution that would negative this literal interpretation of the grant of Federal judicial power.

### § 889. *The Eleventh Amendment.*

The popular objection to this decision immediately aroused and manifested by the adoption of the Eleventh Amendment is a matter of familiar history. The phraseology of that Amendment that the judicial power of the United States "shall not be construed to extend," instead simply that it "shall not extend" to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, was employed in order to give to the Amendment a retroactive effect, and thus defeat suits similar to that of *Chisholm* against Georgia, already pending. And thus when the first of these pending cases came before the Supreme Court,<sup>6</sup> it declared, in a unanimous opinion, that all these cases should be dismissed because of want of jurisdiction.

It will be observed that the Eleventh Amendment does not in terms de-

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<sup>4</sup> 2 Dall. 419.

<sup>5</sup> In the case of *Georgia v. Brailsford* (2 Dall. 402), it had already been held that a State might appear as party plaintiff in a suit against a citizen of another State.

<sup>6</sup> *Hollingsworth v. Virginia* (3 Dall. 378).

clare that the judicial power of the United States shall not be construed to extend to suits brought against a State by its own citizens. Nor is there anywhere in the Constitution a declaration that the United States itself shall not be sued by one of its own citizens. The Supreme Court has, however, held that, in the absence of an express grant of jurisdiction, such suits are, by the generally accepted principles of public law, beyond the jurisdiction of the courts. Indeed, in the case of *Hans v. Louisiana* <sup>7</sup> the court held that the decision in *Chisholm v. Georgia* had been an erroneous one in holding that a State could be sued by a citizen of another State. After referring to the views of Madison and Marshall, expressed in the Virginia convention, and of Hamilton in *The Federalist*, and the reception met by the decision in *Chisholm v. Georgia*, the court declared: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that [*Chisholm v. Georgia*] then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law. . . . It was fully shown in an exhaustive examination of the old law by Mr. Justice Iredell in his [dissenting] opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has in any way been presented."

The foregoing statement as to the error of the declaration in *Chisholm v. Georgia* was, of course, *obiter*.

In *Duhne v. New Jersey* <sup>7a</sup> the Supreme Court refused to entertain original jurisdiction of a suit brought by a citizen against his own State without its consent. To the contention that this might be done under Clause 2, of Section 2 of Article III of the Constitution, which confers upon the Supreme Court original jurisdiction "in all cases . . . in which a State shall be a party," the court said: "the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of Federal jurisdiction previously conferred, and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the jurisdiction previously given. In fact, in view of the rule now so well settled as to be elementary, that the Federal jurisdiction does not embrace the power to entertain a suit brought against a State without its consent, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exer-

<sup>7</sup> 134 U. S. 1.

<sup>7a</sup> 251 U. S. 311.

cise by this court of original jurisdiction in a case where no Federal judicial power is conferred."

In *New Hampshire v. Louisiana* <sup>8</sup> the Supreme Court refused to countenance the attempt of citizens to evade the operation of the Eleventh Amendment by transferring their pecuniary claims to another State and having that State bring suit in their behalf. In this case the court found that in fact the original owners of the bonds and coupons in question still remained the real parties of interest, though not the nominal parties of record, and that, therefore, the suit was not a *bona fide* one between States. The court said: "The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State within the meaning of that term of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens."

#### § 890. *South Dakota v. North Carolina.*

In the case of *South Dakota v. North Carolina*,<sup>9</sup> however, the true party of interest was shown to be the plaintiff State. Jurisdiction was assumed by the Supreme Court and a judgment and decree awarded against the defendant State. The facts of this important case were these:

In 1849 the State of North Carolina chartered a railroad and subscribed for twenty thousand shares of stock of one hundred dollars each. At the same time an issue of bonds was provided for and these shares of stock, thus held by the State, pledged for their payment. These bonds ran for thirty years and became due in 1897. In 1879, however, the State had compromised its debt, including all except about \$250,000 of these bonds. In 1901 the owner of several of these unpaid bonds gave ten of them outright to the State of South Dakota, which State by legislative act authorized the acceptance of them and the institution of suit upon them and the employment for this purpose, by the attorney general, of special counsel who should "be entitled to reasonable compensation out of the recoveries and collections in such suits and actions." Whereupon original suit in the Supreme Court of the United States against the State of North Carolina was instituted. The Supreme Court, by a bare majority of five justices to four, assumed jurisdiction, gave judgment for the plaintiff, and ordered, in default of payment of the amount decreed, the sale at public auction of one hundred shares of the railroad stock owned by the State.<sup>10</sup>

Justice Brewer delivered the opinion of the court. After calling attention to the fact that the validity of the bonds and mortgages was not in doubt,

<sup>8</sup> 108 U. S. 76.

<sup>9</sup> 192 U. S. 286.

<sup>10</sup> The amount was later paid by North Carolina, and thus the forced sale of its stock made not necessary.



Justice Brewer argued that the case did not come within the doctrine of *New Hampshire v. Louisiana*,<sup>11</sup> for the reason that the bonds had been assigned absolutely to the State of South Dakota, and that a recovery upon them would inure to the benefit of that State. The motive which had dictated the assignment of the bonds in question to the State could not, the justice argued, affect the validity of the gift or the jurisdiction of the court. In support of this point was cited *McDonald v. Smalley*,<sup>12</sup> in which it was held that Federal jurisdiction was not affected because the title to the property in question had been conveyed to the plaintiff in the belief that it would be sustained in the Federal and would not be in the State courts, and *Cheever v. Wilson*<sup>13</sup> and other cases in which it was held that if a person take up a *bona fide* residence in another State, he may sue in a Federal court, notwithstanding that his purpose in so doing is that he may resort to the Federal courts in cases in which he would have no standing as a resident of the State in which the Federal courts are held.

The question to be decided in *South Dakota v. North Carolina* was thus reduced to whether, because of the simple fact that the defendant was a State, the court was without jurisdiction. That this question should be answered in the negative, Justice Brewer showed by a review of cases in which it appeared that from the beginning suits instituted by one State against another involving property rights had been entertained and decided.<sup>14</sup>

That which differentiated this case, however, from the cases previously decided was the fact that it was not one for the recovery of a specific piece of property, but for a money judgment upon a debt. To the objection that the court should not exercise jurisdiction for the reason that it would not be able to enforce such a judgment, when rendered, by the sale of public property,<sup>15</sup> or by the levy of a tax,<sup>16</sup> Justice Brewer said that in the case at bar, at least as it was then before the court, it would not have to meet this difficulty for the reason that a sale of the stock mortgaged for the payment of the bonds might produce sufficient to satisfy the plaintiff's claim. "If that should be the result," he said, "there would be no necessity for a personal judgment against the State. . . . Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency to be determined when,

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<sup>11</sup> 108 U. S. 76.

<sup>12</sup> 1 Pet. 620.

<sup>13</sup> 9 Wall. 108.

<sup>14</sup> Approving reference was also made to the declaration of Marshall in *Cohens v. Virginia* (6 Wh. 264), that the adoption of the Eleventh Amendment had been due not so much to a wish to maintain the sovereignty of the State from the degradation supposed to attend a compulsory appearance before a Federal tribunal as the desire to avoid anticipated suits for the collection of certain debts then existing. Whether, as a matter of historical fact, Marshall was justified in making this statement is doubtful.

<sup>15</sup> *Meriwether v. Garrett* (102 U. S. 472).

<sup>16</sup> *Rees v. Watertown* (19 Wall. 107).

if ever, it arises. And surely, if, as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.”

The dissenting opinion, concurred in by four justices, rested in the main upon the argument that the spirit of the Eleventh Amendment prohibited such a suit, and that it should not be violated by the device of transferring the debt from private hands to a State. In support of the position that the spirit and not the strict letter of the Amendment should be followed, the dissenting opinion cited the cases of *New Hampshire v. Louisiana*,<sup>17</sup> *Hans v. Louisiana*,<sup>18</sup> and *Smith v. Reeves*.<sup>19</sup>

In the first of these cases, argued the opinion, it was conceded that, but for the fact that the defendant was a State, the title of the plaintiff would have supported a cause of action, and that, therefore, it had been the spirit rather than the letter of the Eleventh Amendment which had governed the court in refusing jurisdiction. In *Hans v. Louisiana* the suit was clearly not forbidden by the letter of the Eleventh Amendment, for it was one not between a State and a citizen of another State, but between a State and one of its own citizens. Yet the court held that the general policy laid down by the Amendment forbade its prosecution. In *Smith v. Reeves*, controlled by the spirit of the Eleventh Amendment, the court refused to permit a State to be sued by a Federal corporation which claimed that, by virtue of the law of its creation, it had the right to invoke the jurisdiction of the Federal courts even in a suit against a State, the Eleventh Amendment to the contrary notwithstanding. In denying this claim the court, applying the spirit rather than the letter of the Amendment, said: “It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a State by private individuals or State corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a State without its consent.” So also, it was pointed out, that in *United States v. North Carolina*<sup>20</sup> and in *United States v. Texas*<sup>21</sup> the spirit, rather than the letter of the Constitution, was followed in holding that, though not specifically granted the power, the Supreme Court might entertain a suit brought by the United States against one of the individual States of the Union. To entertain jurisdiction in the present case was, indeed, the dissenting justices pointed out, to render justiciable claims that were not even within the reach of the ruling of *Chisholm v. Georgia*, for it would permit the assignment to and collection by another State of claims held by citizens against their

<sup>17</sup> 108 U. S. 76.

<sup>18</sup> 134 U. S. 1.

<sup>19</sup> 178 U. S. 436.

<sup>20</sup> 136 U. S. 211.

<sup>21</sup> 143 U. S. 621.

own States. Indeed, the opinion argued, the logical effect of the decree concurred in by the majority of the court, would be, in the light of the jurisdiction of the Supreme Court as upheld in *United States v. North Carolina* and *United States v. Texas*, to render the United States suable for any claim against it which private individuals might transfer to a State.

Still further, it was argued in the dissenting opinion, that, independently of the foregoing objections, the claim of South Dakota should have been refused recognition for the reason that it was based upon an assignment of a debt, which did not constitute, and never had constituted a justiciable obligation against the State of North Carolina, and that, therefore, South Dakota as assignee should not be held to have received any legal right which the assignor himself had not had. In support of this contention, reference was made to *United States v. Buford*,<sup>22</sup> in which it was held that a claim, barred by the statute of limitations, would not be made enforceable by assignment to the United States, against which, ordinarily, the statute does not run. Finally, upon mere grounds of equity, it was argued that the suit of South Dakota should have been dismissed, as it was apparent that the whole proceeding was but a part of a scheme to evade a constitutional provision.<sup>23</sup>

**§ 891. Eleventh Amendment Does Not Apply to Suits Instituted by a State: *Cohens v. Virginia*.**

In the great case of *Cohens v. Virginia* <sup>24</sup> the question arose whether the Supreme Court of the United States might exercise jurisdiction in cases appealed to it from the highest court of a State, in cases in which the State had obtained a judgment, civil or criminal, against a citizen, but in doing so had overruled a Federal right, privilege or immunity set up by that citizen. Upon the part of Virginia it was argued that not only did the grant by the Constitution of judicial power to the United States not contemplate a right to revise the decisions of State courts in which a State was a party (as in the case at bar, in which, being a criminal case, the State appeared as the original plaintiff), but that to exercise the right to reverse a judgment obtained in its favor in its courts would be, in effect, to entertain a suit against itself.

The facts upon which this case was founded were these: Congress had authorized the establishment of a lottery by the corporation of the city of Washington in the District of Columbia. Virginia had passed a law forbidding the sale, within its limits, of lottery tickets. Cohens was arrested for selling in Virginia lottery tickets of the Washington lottery, and in

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<sup>22</sup> 3 Pet. 12.

<sup>23</sup> Other objections to the decree of the court were raised in the dissenting opinion, which, however, do not need to be considered at this place.

<sup>24</sup> 6 Wh. 264.

defence set up the law of Congress.<sup>25</sup> This defence was overruled, Cohens was convicted, and his conviction affirmed in the highest court of Virginia. Thereupon, by writ of error, he appealed to the Supreme Court of the United States under the authority of the twenty-fifth section of the Judiciary Act.

Chief Justice Marshall rendered the unanimous opinion of the court. After calling attention to the clause of the Federal Constitution which gives to the Federal judiciary jurisdiction in all cases, in law and equity, arising under the Constitution, laws, and treaties of the United States, it was pointed out that upon those who would make exceptions to this general grant of power must fall the burden of proof. In fact, as Marshall went on to declare, to grant the contention set up by Virginia would be to defeat the very ends for the attainment of which the Constitution was adopted. If granted, he said, "what power of the [Federal] Government could be executed by its own means, in any State disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be at any time arrested by the will of one of its members. Each member will possess a veto on the will of the whole." Concluding his argument upon this point, Marshall said: "After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the Constitution has not made, and we think that the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties."

The State of Virginia had, however, as we have said, still another argument which had to be overcome. Granting, counsel said, that the case be construed to come within the Federal judicial power as originally granted by the Constitution, it had nevertheless been withdrawn from that power since the adoption of the Eleventh Amendment. To this argument, Marshall replied that the Amendment was not intended to cover cases in which a State might be defendant in error, but only those originally instituted against her by an individual. By that amendment the judicial power is not to extend to any suit "commenced or prosecuted" against a State by citizens of another State. "To commence a suit," says Marshall, "is to demand something by the institution of a process in a court of justice, and to prosecute the suit is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand the process sued out by that

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<sup>25</sup> As to the power of Congress as decided in this case, when acting as the legislature for the District of Columbia to authorize acts beyond its limits, see Chapter XXVII.

individual against the State, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. . . . If a suit brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit [at bar] is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defense against a claim made by a State."

**§ 892. Corporations Chartered by, and of which the State Is a Stockholder, May Be Sued.**

In *Bank of the United States v. The Planters' Bank of Georgia* <sup>26</sup> it was held that a suit against a corporation chartered and partly owned by the State is not a suit against the State. "The State does not," said Marshall, "by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it. It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

The principle laid down in this case was again applied in the cases of *Briscoe v. Bank of Kentucky*,<sup>27</sup> and *Bank of Kentucky v. Wister*,<sup>28</sup> although the State in these cases was the exclusive owner of the stock of the bank.

In *Murray v. Wilson Distilling Co.*<sup>29</sup> the important doctrine was declared that when a State undertakes a private business, as, for example, the selling of liquor, it does not forfeit its immunity to suit under the Eleventh Amendment, and may not, therefore, be sued with reference to transactions connected with such non-governmental business. In *South Carolina v. United States* <sup>30</sup> it will be remembered that the Supreme Court recognized a clear line of decision between State functions essentially political or governmental in nature, and those of a private or commercial character, and said that, as to these, the limitation upon the taxation by the Federal Government of State agencies does not apply. Furthermore, as has been earlier pointed out, corporations wholly or in part owned by

<sup>26</sup> 9 Wh. 904.

<sup>27</sup> 11 Pet. 257.

<sup>28</sup> 2 Pet. 318.

<sup>29</sup> 213 U. S. 151.

<sup>30</sup> 199 U. S. 437.

a State are not, for that reason, exempt from suit, but the State when it becomes the owner and participant in the management of a private enterprise throws off, as to such enterprise, its sovereign character. The question raised in the case of *Murray v. Wilson Distilling Co.* is whether the same doctrine as to immunity of suit applies when the business is directly conducted by a State itself and not through a private corporation, chartered by itself, and of whose stock it is the part or sole owner.

**§ 893. Effect of Eleventh Amendment upon Federal Constitutional Rights Guaranteed against State Violation.**

In a series of cases the Supreme Court of the United States has laid down the doctrine that the Eleventh Amendment does not grant to States nor to their agents a power, unrestrainable by judicial process, either to interfere with the exercise of Federal rights or, under color of unconstitutional legislation, to violate the private rights of individuals. Where this danger has been threatened, writs of injunction have been issued, and, for the performance by State officials of purely ministerial acts prescribed by law, mandamus has been awarded. Thus in *Hans v. Louisiana*<sup>31</sup> the court, after admitting the non-suability of a State either by its own citizens or citizens of other States, took the precaution to say: "To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the State consents to be sued, or comes itself into court; yet, where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under the contracts, may be judicially resisted; and a law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

Acting under the right thus declared of preventing a State, or, rather, the officials of a State, from acting under laws unconstitutional, either because impairing the obligation of contracts, or taking property without due process of law the Federal courts, while declaring themselves unable to secure to private individuals an enforcement of their claims against States, have nevertheless been able to extend their protecting power to prevent the States from taking action upon their part to enforce against individuals and against Federal officials claims not supported by valid laws.

**§ 894. Suits to Recover Specific Pieces of Property Held by the State.**

Thus far in the discussion of the suability of the State, according to American constitutional law, reference has been had to suits involving the

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<sup>31</sup> 134 U. S. 1.

recovery of money judgments or the issuance of writs of mandamus or of injunction to State officials. There now is to be considered the question whether the principles that have been laid down are sufficient to warrant suits brought by individuals to recover possession of specific pieces of property held, in their official capacities, by officials of the States or of the United States.

### § 895. Set-offs against the State.

In *United States v. Clarke* <sup>32</sup> it was declared by Marshall that the United States was not suable of common right, and that, unless the plaintiff could bring his suit within the terms of some permissive act of Congress, the court could not entertain it.

In *The Siren v. United States* <sup>33</sup> this was quoted with approval and the further observation made that the exemption from suit extends to the property of the United States. The further doctrine, which had been previously declared in several cases, was affirmed in this case, that "although direct suits cannot be maintained against the United States, nor against their property, yet when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed. . . . They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

### § 896. Liens.

The interesting point was, however, made in this case, that though a lien attaching to a piece of property owned by the State is not enforceable, the lien itself may exist, and becomes enforceable as soon as the State voluntarily sells or otherwise parts with the actual possession of the property. Thus in the case at bar which was a suit to subject the proceeds from the sale of a ship, taken as a prize of war by the United States, to a claim for damages occasioned by the collision of that ship with a ship privately owned, the court granted the claim, saying:

"The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. Thus, if the government, having the title to land subject to the mortgage of the previous owner, should transfer the property, the

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<sup>32</sup> 8 Pet. 436.

<sup>33</sup> 7 Wall. 152.

jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

"So, if the property belonging to the government, upon which claims exist, is sold upon judicial decree and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.

"Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from the sale and are to be satisfied out of them. Assuming, therefore, that *The Siren* was in fault and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The Government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture."

In *The Davis* <sup>34</sup> it was held that personal property of the United States was subject to a lien for salvage purposes, if such property was not actually in the possession of the United States, and if the lien could be enforced without bringing a direct suit against the United States. Defining what should be deemed possession under this rule, the court said that it must be an actual and not a constructive one—one that "can only be changed under process of the court by bringing the officer of the court into collision with the officer of the Government, if the latter should choose to resist."

### § 897. Suability of State Agencies and Minor Political Bodies or Other Agencies.

In pursuance of this subject it is to be observed that the principle of the non-amenability of the States of the Union to suit does not extend to their incorporated local political agencies. These are suable, but, it has been held that they may not be held liable, without consent of their State, in contract or in tort in so far as they are viewed as agencies of the State, and not merely as local agencies. When viewed in this latter light they may be sued in contract, and even in tort, money judgments may be rendered against them, and mandamus may be awarded to compel the necessary appropriation and the levying and collection of taxes to pay the judgments thus rendered. In some cases also, the private property of such public corporations which is not directly used in the public service may be sold on execution.<sup>35</sup>

<sup>34</sup> 10 Wall. 15.

<sup>35</sup> *Meriwether v. Garrett* (102 U. S. 472); *Rees v. Watertown* (19 Wall. 107).



In *Hopkins v. Clemson Agricultural College* <sup>36</sup> it was held that a public corporation, such as an agricultural college, which receives State aid and is invested with municipal powers, cannot plead the State's constitutional immunity from suit in a proceeding against it for constructing, under State authority, but for its own corporate purposes, a dyke upon land owned by the State, whereby damage is done to private property without due process of law. With reference to cases in which State colleges, prison boards, lunatic asylums, and other public institutions had been held to be agents of the State,<sup>37</sup> the court said that an examination of them would show that they had involved questions of liability in a suit rather than immunity from suit; that is, in most instances, the cases had been actions for torts committed, not by the corporate bodies in question, but by officers of the law, and that the corporations themselves had been held not liable on the same ground that municipalities are held immune from suits based upon wrongful acts of their officials or other agents, when performing governmental, that is, State functions. "But," said the court in the instant case, "the plaintiff is not seeking here to hold the college liable for the nonfeasance or misfeasance either of its own officers or officers of the public. This is a suit against the college itself for its own corporate act." To the argument that the court should not take jurisdiction of the case because the college had no property against which a judgment, if rendered, could be enforced, the court replied that, as to lands used by the college, the title of which was in the State, no proceedings could be taken without the consent of the State, and that the court could not decree the removal of the embankment which formed a part of the State's property,<sup>38</sup> but that the prayer for that part of the relief could be stricken out without depriving the court of jurisdiction to hear and determine the question whether the college was liable to the plaintiff for its own corporate act in building for its own proprietary and corporate purposes a dyke which, it was alleged, damaged or took the plaintiff's property.<sup>39</sup>

In *Lankford v. Platte Iron Works Co.*<sup>40</sup> it was held that the suit of a depositor in an insolvent bank to compel the Board under the Oklahoma Bank Depositors' Guaranty Act to pay his deposit out of the fund created by that act, or if that should be insufficient, to issue a certificate of indebtedness and levy an assessment to make up the deficit, was a suit against the State. Under the act in question the Board was composed of the bank commissioner and three other persons appointed by the Governor, and was given supervision and control of a guaranty fund which was created by levies against the capital stock of every bank organized under laws of the State, and was

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<sup>36</sup> 221 U. S. 636.

<sup>37</sup> Cf. 29 L. R. 378, note.

<sup>38</sup> Citing *Cunningham v. Macon & B. R. Co.* (109 U. S. 446).

<sup>39</sup> Citing *Columbia Water Power Co. v. Columbia El. Street R. L. & P. Co.* (20 S. E. 1002).

<sup>40</sup> 235 U. S. 461.

to be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in the act. The Board was authorized to make, if necessary, additional assessments upon the banks, and the State was to have, for the benefit of the guaranty fund, a first lien upon the assets of insolvent banks.

The court relied upon *Murray v. Wilson Distilling Co.*<sup>41</sup> In this case the State of South Carolina had assumed exclusive management of all traffic in liquor, but had later abandoned the scheme and passed a State Dispensary Act to provide for the disposition of all property of the instrumentality which it had created under the earlier act, and, for this purpose, had created a commission a part of whose duties it was to dispose of the property of, and collect all debts due to, that instrumentality, and to pay all just liabilities thereof. Any surplus was to be paid into the treasury of the State. The Wilson Distillery Co. contended that thus was created a trust fund and that its suit was as a *cestui que trust* to compel the trustee, holding property for the company's benefit, to perform the duties imposed upon him by the law of the State, and that, therefore, the suit was not one against the State. The court, however, held that the State had not intended to divest itself of its right of property in the assets of the governmental agency so as to endow the commissioners with a right and title to the property such as would authorize a judicial tribunal to take the assets out of their hands, and, by means of a receiver, to administer them as property affected by a trust, irrevocable in its nature; and thus to dispose of these funds without the presence of the State. The court, in the Oklahoma case, pointed out that, in that case, were presented some differences from the South Carolina case, since, in the South Carolina case, the State was the owner of the property committed to the commissioners for disposition, and was also the original debtor, whereas, in the Oklahoma case, the property was that of the contributing banks and was accumulated in the fund for the security of their respective depositors. But, said the court, it appeared from decisions of the Oklahoma courts that the law had intended to give to the State as definite a title to the depositors' guaranty fund as was the title of South Carolina to the assets of the State dispensary. "In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund, having this ultimate destination, does not take its administration from the officers of the State, or subject them to judicial control."<sup>42</sup>

In *Johnson v. Lankford*<sup>43</sup> action was brought against the bank commis-

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<sup>41</sup> 213 U. S. 151.

<sup>42</sup> Four justices dissented, holding that the instant case was distinguished in principle from that of the South Carolina case.

<sup>43</sup> 245 U. S. 541.

sioner of the State of Oklahoma for failure properly to perform duties imposed upon him by the State law, whereby the plaintiff was damaged. The suit was held not to be one against the State. The court said: "The case is not like *Lankford v. Platte Iron Works*, 235 U. S. 461. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the State had a title and which it administered through its officers. Any demand upon it was a demand upon the State and a suit to enforce the demand was a suit against the State, necessarily precluded by the purpose of the law. The case at bar is not of such character. Its basis is *Lankford's* dereliction of duty, a duty enjoined by the laws of the State. . . .

"The present case finds example in *Hopkins v. Clemson College*, 221 U. S. 636."

#### § 898. Suits against State Officers: When Considered Suits against the State.

Though, as has been seen, the suability of the United States, and, since the Eleventh Amendment, of an individual State of the Union, by a citizen is not and has not been questioned, the courts have often found great difficulty in determining just when a suit may be said to be against the State itself, and, therefore, beyond their jurisdiction, and when against the officials of the State personally, in which case they have jurisdiction. Because the courts have not been able to lay down any fully satisfactory rule upon this point, it will be necessary to consider *seriatim* the more important cases in which the question has been involved.

There will first be considered the cases in which the claim has been set up, but denied by the court, that the suit on trial is one against the State, and as such beyond the competence of the court to entertain.

#### § 899. *United States v. Peters*.

In the case of *United States v. Peters*,<sup>44</sup> decided in 1809, a judgment was given against the heirs of the State treasurer of Pennsylvania, for money improperly received and held by him as such treasurer but not actually paid into the State treasury. The State of Pennsylvania among other grounds set up that the judgment, though in form against an individual, was in fact against itself and as such prohibited by the Eleventh Amendment. As to this Chief Justice Marshall, who rendered the unanimous opinion of the court, declared: "The right of a State to assert as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States is not affected by this Amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment

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<sup>44</sup> 5 Cr. 115.

simply provides that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. . . . It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title."

Marshall then went on to show that in the case at bar the property in question had in fact never been paid over to and thus gone into the possession of the State.

#### § 900. *Osborn v. Bank of the United States.*

In the case of *Osborn v. Bank of the United States* <sup>45</sup> an injunction was asked of the Federal court to restrain the auditor of the State of Ohio from proceeding against the Bank of the United States under a tax law of that State which law, it was alleged, was in violation of the Federal Constitution. Among other grounds for resistance to this application it was argued that the actual defendant in interest in the case was the State; that the State was not and could not be made a defendant of record, and that, therefore, its agents might not be restrained. To this Marshall, who rendered the opinion of the court, replied that the direct interest of the State in the suit was admitted, and, also, that under the Eleventh Amendment it could not be made a party of record, but that this did not render the Federal court powerless to restrain the State's agents from proceeding under an unconstitutional law against an individual or corporation. In supporting this contention, Marshall, as was his wont, argued not so much from the requirements of technical procedure or from the letter of the Constitution, as from the general character of the government intended to be established and maintained by that instrument, and from the politically inconvenient and destructive results that would follow from an acceptance of the doctrine he was controverting. "A denial of jurisdiction" he said, "forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that, if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts;

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<sup>45</sup> 9 Wh. 738.

and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. . . . The person thus obstructed in the performance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties."

In the *Osborn* case the Supreme Court did not permit a State to interfere with the exercise of the functions of a Federal agent, i. e., the Bank, and shield itself behind the Eleventh Amendment. In succeeding cases the Supreme Court has in similar manner refused to allow the States, through their respective agents, to interfere with the personal and property rights of private individuals. In other cases, the Supreme Court has restrained them by writs of injunction from violating private rights under color of authority derived from unconstitutional laws. Thus in *Board of Liquidation v. McComb* <sup>46</sup> the court said: "A State without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

However, as will later be seen, the Supreme Court has not permitted this principle of the legal responsibility of the agents of a State to countenance what is in actual effect a suit not against them personally, but against them officially as agents of the State, and, therefore, in reality against the States themselves whose officials they are. Nor has the court been willing to command the performance by a State official of other than mere ministerial acts in which no official discretion has been involved.

### § 901. Rule as to States Being Parties of Record.

As a conclusion from his argument in *Osborn v. Bank of the United States*, Marshall laid down the following rule: "It may, we think, be laid down as a rule that in all cases where jurisdiction depends on the party,

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<sup>46</sup> 92 U. S. 531.

it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State or by aliens."

The rule thus laid down has not been adhered to. Indeed, it had almost immediately to be altered. In *Governor of Georgia v. Madrazo*<sup>47</sup> it was held that the Eleventh Amendment forbade the prosecution of a suit for money actually in the treasury of the State and mixed with its general funds or property legally in the hands of the governor acting officially as its chief executive. "The claim upon the governor," said Marshall, "is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not personally, but officially. . . . In such a case, where the chief magistrate of a State is sued not by his name, but by his style of office and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record." With a consequence, of course, that the jurisdiction of the court was ousted by the Eleventh Amendment.

And thus from time to time the court refused to follow Marshall's rule, and later definitely abandoned it. In *Pennoy v. McConaughy*<sup>48</sup> the court declared: "It is the settled doctrine of this court that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit."<sup>49</sup>

### § 902. Mandamus to State Officials.

The case of *Louisiana v. Jumel*<sup>50</sup> is a leading one upon the question as to when the Supreme Court will award a mandamus to compel the performance by a State officer of a duty which, under color of an unconstitutional law, he refuses to perform to the prejudice of the parties plaintiff.

The State of Louisiana in 1874 provided for an issue of bonds, and in the same law provided for the levying and collection of a particular tax to create a sinking fund for their payment. In 1880, however, by a new Constitution, this provision for payment was abolished. Thereupon Jumel, as one of the holders of the bonds, alleging that that part of the new Constitution which had this effect was in violation of the Federal Constitution as an impairment of the contract between the State and the holders of

<sup>47</sup> 1 Pet. 110.

<sup>48</sup> 140 U. S. 1.

<sup>49</sup> Citing *New Hampshire v. Louisiana* (108 U. S. 76); and *In re Ayers* (123 U. S. 443).

<sup>50</sup> 107 U. S. 711.

its bonds, applied for a mandamus to compel the treasurer of the State to apply the sinking fund that had been created to the payment of the bonds, and to continue to levy and collect the tax originally provided for. Upon appeal, the Supreme Court of the United States admitted the existence of a valid contract, but denied the relief prayed upon the following grounds:

"The relief asked will require the officers, against whom the process goes, to act contrary to the positive order of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do. They must use the public money in the Treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared it shall not be done.

"In the *Arlington Case*—*U. S. v. Lee* (106 U. S. 196)—it was held that the officers of the United States, holding in their official capacity the possession of lands to which the United States had no title, could be required to surrender their possession to the rightful owner even though the United States were not a party to the judgment under which the eviction was to be had. Here, however, the money in question is lawfully the property of the State. It is in the manual possession of an officer of the State. The bondholders never owned it. The most they can claim is that the State ought to use it to pay their coupons, but until so used it is in no sense theirs.<sup>51</sup>

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<sup>51</sup> Justices Field and Harlan filed dissenting opinions. In his dissent Justice Field argued that the act asked of the Treasurer was a purely ministerial one which the court had repeatedly said might be compelled (*Board of Liquidation v. McComb*, 92 U. S. 531), and denied that there was any necessity that the particular money for the payment of the bonds should have been segregated in the state treasury.

"If," he said, "the new Constitution had never been adopted there could be no question as to the power of the State courts to require that the moneys collected be applied to the payment of the interest. It would not only have been the duty of the Board of Liquidation to thus apply them, but it would have been a felony to have refused to do so. Now, whatever enactment, constitutional or legislative, impairs the obligation of the contract with the bondholders, that is, abrogates or lessens the means of its enforcement, is void. Therefore, the new Constitution, as to that contract, is to be treated as though it had never existed. . . . Nor is there any force in the objection that the funds which the complainants and petitioners seek to reach are in the treasury of the State. They are appropriated by the law of 1874 and by the constitutional amendment of that year to the payment of the interest on the consolidated bonds. . . . The ministerial duty only remained with the officer of the State having charge of the fund, whatever it might be, to apply it. . . . Nor is there any weight in the objection that the officers of the State are called upon to enforce the collection of the tax. They are simply called upon to obey the mandates of the law and Constitution of the State. Both levy the tax and designate the amount and the officers to collect it. . . . The State cannot speak through an enactment which controverts the federal Constitution."

In *Hagood v. Southern* <sup>52</sup> the court said: "A broad line of demarcation separates from such cases as the present, in which the decree requires, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority, unconstitutional and void. Of such actions, for the redress of the wrong, it was said by Mr. Justice Miller in *Cunningham v. Macon & Brunswick R. R. Co.* (109 U. S. 446): 'In these cases he is not sued as or because he is the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him.'" <sup>53</sup>

In *Pennoyer v. McConnaughy* <sup>54</sup> was again clearly stated the distinction between those suits brought against State officials which are to be regarded as suits against the State, and those which are not. "It is well settled," said the court, "that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that 'no State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against a State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."<sup>55</sup>

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<sup>52</sup> 117 U. S. 52.

<sup>53</sup> The opinion continued: "Of such cases, that of *United States v. Lee* (106 U. S. 196), is a conspicuous example, and it was upon this ground that the judgment in *Poin-dexter v. Greenhow* (114 U. S. 270) was rested. And so the preventive remedies of equity by injunction may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case in *Allen v. B. & O. R. R. Co.* (114 U. S. 311), where many such instances are cited."

<sup>54</sup> 140 U. S. 1.

<sup>55</sup> Citing *In re Ayers* (123 U. S. 443); *Louisiana v. Jumel* (107 U. S. 711); *Antoni v. Greenhow* (107 U. S. 769); *Cunningham v. Macon & B. R. R. Co.* (109 U. S. 446); *Hagood v. Southern* (117 U. S. 52).



"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State." <sup>56</sup>

In *Re Tyler* <sup>57</sup> and *Scott v. Donald* <sup>58</sup> was again applied the doctrine that the Eleventh Amendment does not prevent the issuance of writs of injunction to prevent injuries threatened to individuals by officers claiming the authority of an unconstitutional legislative act, or to prevent the granting of mandamus to compel the performance by them of plain legal duties, purely ministerial in character.

In *Smith v. Reeves*, <sup>59</sup> however, the action was held to be one against the State. In that case an action had been brought against the defendant "as treasurer of the State of California" to repay to the plaintiffs taxes which they had paid, but which, they alleged, had been unconstitutionally levied. The court said: "In the present case the action is not to recover specific moneys in the hands of the State treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the State to pay a certain amount on account of the payment of taxes alleged to have been wrongfully exacted by the State from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the State, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment."

### § 903. The Virginia Debt Controversy.

The question of the suability of a State was so fully and illuminatingly developed in the efforts of the State of Virginia to avoid the payment of certain parts of its debt, that a somewhat detailed account of the controversy is warranted.

The Civil War left that State in a greatly impoverished condition and at the same time saddled with a large debt and accumulated interest there-

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<sup>56</sup> Citing *Osborn v. Bank of the United States* (9 Wheat. 738); *Davis v. Gray* (16 Wall. 203); *Tomlinson v. Branch* (15 Wall. 460); *Litchfield v. Webster County* (101 U. S. 773); *Allen v. Baltimore & O. R. Co.* (114 U. S. 311); *Louisiana Board of Liquidation v. McComb* (92 U. S. 531); *Poindexter v. Greenhow* (114 U. S. 270).

<sup>57</sup> 149 U. S. 164.

<sup>58</sup> 165 U. S. 107.

<sup>59</sup> 178 U. S. 436.

upon. In 1871 an act was passed refunding the debt and counting off one-third of it as the portion justly belonging to the State of West Virginia. By this law it was provided that the interest coupons on these new bonds should be receivable in payment of taxes and claims due to the State. This created a valid contract between the State and its bondholders.<sup>60</sup> Soon after this there arose in the State the so-called "Readjustment" agitation led by United States Senator William Mahone, founded upon the alleged right of the State to escape if possible from the burden of this refunded debt. This led to an act passed by the State requiring, when coupons were offered in payment of taxes, that the collector should receive them only for identification, and that he should exact payment of the taxes in money, but that if, later, the coupons were satisfactorily identified and verified, the money so paid might be recovered back. This act was popularly termed the "coupon killer," as the State judges and juries were depended upon to refuse, when in any case it was possible to do so, to identify the coupons. Also an act was passed fixing the manner in which relief should be granted in case coupons were improperly refused acceptance, and providing for the taxation of bonds.

The validity of these acts was immediately contested. In *Hartman v. Greenhow* <sup>61</sup> the Supreme Court awarded a mandamus to compel the treasurer of the State to receive the coupons in payment of taxes without first subtracting from them a tax upon the bonds to which they had been attached.

In *Antoni v. Greenhow* <sup>62</sup> it was held that the "coupon killer" act was valid in so far as it merely changed the means by which the holder of the coupons could compel their application to the payment of taxes when they had been refused acceptance.<sup>63</sup>

In its opinion the court took pains to explain that it did not pass upon the question whether the tax collector was justified in refusing to accept the coupons in payment of taxes, but simply whether, if he did refuse, the remedy provided by the new law was substantially equivalent to that which the holder of the coupons possessed at the time the bonds were issued. Thus the constitutionality of the entire act was not in question, but only that part of it which related to the remedy afforded in case the

<sup>60</sup> *Furman v. Nichol* (8 Wall. 44).

<sup>61</sup> 102 U. S. 672.

<sup>62</sup> 107 U. S. 769.

<sup>63</sup> From this decision Justice Field dissented. "How can it be maintained," he declared, ". . . that the legislation of January 14 and April 7, 1882, does not impair the obligation of the contract under the Funding Act. It annuls the present receivability of the coupon; it substitutes for the specific execution of the contract, a protracted litigation, and when the genuineness of the coupon and its legal receivability for taxes are judicially established, its payment is made dependent upon the existence of money in the treasury of the State." Justice Harlan also dissented. "To my mind," he said, ". . . the change in the remedies has impaired both the obligation and value of the contract."

coupons were refused acceptance. In *Poindexter v. Greenhow*,<sup>64</sup> however, the constitutionality of the provision of the law of 1882 which required tax collectors to receive in payment of taxes only gold and silver and United States notes and National Bank currency, came up for consideration. Poindexter tendered coupons in payment of his taxes, and, when they were refused acceptance, refused to tender currency, and, when his personal property was seized, brought action of detinue against Greenhow, treasurer and collector of taxes of the city of Richmond, Virginia. Upon appeal to the Supreme Court of the United States, the court held the Virginia act unconstitutional as impairing the obligation of the contract into which the State had entered in 1871, and declared, therefore, that the action of Greenhow in refusing to receive the tender of coupons was unwarranted, and his seizure of the plaintiff's property a trespass.

"This immunity from suit, secured to the States," said the court, "is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party being a citizen of another State or a citizen or subject of a foreign State. But it is equally true that whenever in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this court since the adoption of the Eleventh Amendment to the Constitution, are numerous."<sup>65</sup>

"The *ratio decidendi* in this class of cases," the opinion continued: "is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish

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<sup>64</sup> 114 U. S. 270.

<sup>65</sup> Citing *Fletcher v. Peck* (6 Cranch, 87); *N. J. v. Wilson* (7 Cranch, 164); *Green v. Biddle* (8 Wheat. 1); *Providence Bk. v. Billings* (4 Pet. 514); *Woodruff v. Trapnall* (10 How. 190); *Wolff v. New Orleans* (103 U. S. 358); *Jefferson Branch Bk. v. Skelley* (1 Black, 436).

it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrevocable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defence. . . . The thing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a 'suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' Nothing else is touched; and suits between individuals, unless the State is the party in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a State or the operations of its government. The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State and in violation of the Constitution of the United States."<sup>66</sup>

The law of 1882 having been held void, the State next passed an act requiring the bond to which it had been annexed to be produced when a coupon was presented in payment of taxes. By another act was also prohibited the testimony of "expert" witnesses as to the genuineness of the coupons. These laws the Virginia court held constitutional.

In *McGahey v. Virginia*<sup>67</sup> when the State brought suit for taxes against certain individuals who had tendered payment in coupons but had not produced the bond to which they had been attached, as provided for by the Virginia law, spoken of above, the Supreme Court held this provision unconstitutional as an unreasonable condition, and, therefore, as im-

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<sup>66</sup> Chief Justice Waite and Justices Miller, Bradley and Gray dissented.

<sup>67</sup> 135 U. S. 662.

pairing the obligation entered into by the State in 1871. "If enforced," said the court, "it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. . . . It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them." In like manner the provision prohibiting expert testimony establishing the genuineness of the coupons was held unconstitutional and void. Also was held unconstitutional, as unreasonable, the law which the State had passed requiring for the sale of coupons a license fee of one thousand dollars in towns of more than 10,000 inhabitants, and of five hundred dollars in other counties and towns, together with an exaction of twenty per cent. of the face value of every coupon sold. A law fixing a limit of time within which the coupons should be presented or tendered in payment of taxes met a similar fate. In 1886 Virginia had passed an act providing that any lawyer who should give his professional services in matters pertaining to payment to the State of coupons for taxes or other demands, should be adjudged guilty of barratry and be disbarred, and that any one not a lawyer, who should tender advice or assistance in reference to these matters should be held guilty of champerty and subjected to a fine of three hundred dollars and imprisonment for sixty days. In pursuance of this law it became known that the grand jury was considering indictments against a Mr. Royall, a lawyer who had been for years identified with suits brought to compel the acceptance by the State of the coupons of the bonds of 1871. Thereupon Mr. Royall published a letter in which he asserted that the law in question was unconstitutional and that he would sue for damages any member of the grand jury who should find a true bill against him for a violation of it. Upon this, the grand jury reported that it had sufficient evidence to indict Mr. Royall, but that, in view of his threats, it would not return a true bill against him. A Virginia court thereupon fined Mr. Royall for an attempt to intimidate the grand jury, and in default of payment of the fine committed him to jail. Mr. Royall sued out a writ of habeas corpus to a Federal court, which discharged him upon the ground that it was a right of a citizen of the United States to sue, or threaten to sue, whomsoever he pleased. The final judicial phase of the controversy was brought before the Supreme Court in the case of *McCullough v. Virginia*,<sup>68</sup> a case which has already been considered in the chapter dealing with the Obligation of Contracts.<sup>69</sup>

#### § 904. In Re Ayers.

In 1884, the State of Virginia had passed an act which became known as the "coupon crusher," which provided that when coupons were tendered,

<sup>68</sup> 172 U. S. 102.

<sup>69</sup> See § 772.

the collector was to report the fact to the law officer of the Commonwealth and he was to bring suit for the taxes for the payment of which they were offered, and, if the coupons should not prove genuine, judgment, interest, a penalty, and an attorney's fee were to be given against the one offering them; execution should issue on the judgment, and if this was not paid, a second suit, with more interest, penalties, and attorney's fees should be brought, and so on *ad infinitum*.

An injunction was asked by certain citizens and granted by a Federal Circuit Court to restrain the attorney general of the State from putting these acts into force. This injunction that officer disobeyed. For this he was fined by the Federal Circuit Court and, upon his refusal to pay the fine, was committed to jail. Thereupon he sued out a writ of habeas corpus to the Supreme Court of the United States.<sup>70</sup>

That court held that the writ of injunction had been improvidently granted, that the commitment for contempt was consequently void, and released Ayers. The following was the argument of the court. "The tender of the coupon, though constituting upon its face a legal tender of payment of taxes, did not deprive the State of the right to attempt by suit to prove the coupons not valid, and, therefore, that their tender in payment of the taxes was not a sufficient tender. The bringing of a suit by the law officer of the State after tender of coupons had been made was, in itself, no violation of a personal or property right and was in itself the breach of no contract. Indeed, the court declared, there was not a contract between the bondholders and the law officers of the State, personally considered. The suit was, therefore, not against them personally, but as officers of the State, to prevent them from bringing suits in the name and for the use of the State of Virginia. Therefore, it was declared, to restrain them was directly to coerce the State by judicial process at the instance of private individuals, a proceeding which the Eleventh Amendment forbids. But, the court was careful to say, "it is not intended in any way to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."<sup>71</sup>

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<sup>70</sup> *Ex parte Ayers* (123 U. S. 443).

<sup>71</sup> Citing with approval *Board of Liquidation v. McComb* (92 U. S. 531).

Justice Harlan rendered a dissenting opinion in which he declared: "The difference between a suit against officers of the State, enjoining them from seizing property of the citizen, in obedience to a void statute of the State, and a suit enjoining such officers from bringing under the order of the State, and in her name, an action which, it is alleged, will result in injury to the rights of the complainant, is not a difference that affects the

**§ 905. Reagan v. Trust Co.**

In *Reagan v. Farmers' Loan & Trust Co.*<sup>72</sup> an injunction was sustained against the attorney general of a State and the members of a State board of railway commissioners, restraining them from putting into force a schedule of rates which the board, acting under statutory authority, had established. The jurisdiction of the lower Federal court which had granted the writ was sustained, upon the ground that the Eleventh Amendment did not apply to cases in which the States have no pecuniary or proprietary interest, but only a governmental interest in the matter involved. The same position seems to have been accepted in *Smyth v. Ames*.<sup>73</sup>

In the *Reagan* case the court said: "So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character, and, as an individual employs the railroad company to carry its property." "There is a sense, doubtless," the opinion continued, "in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment."

The position thus taken, it is to be observed, furnished but one of the grounds upon which the decision of the case at bar was rested, and, it would seem, not a very strong one, especially if there be taken into consideration the position which has since been taken by the court in *Missouri v. Illinois*<sup>74</sup> and *Kansas v. Colorado*<sup>75</sup> that the State in its character as *parens patriæ* may bring suit to maintain the general interests of its citizens.

**§ 906. Fitts v. McGhee.**

Later, in *Fitts v. McGhee*,<sup>76</sup> a case in which was dissolved an injunction obtained by a railroad company preventing the attorney general of a State from executing an act which the plaintiff alleged to be unconstitutional, the court did not refer to the distinction made in the *Reagan* case and accepted in the *Smyth* case, but, instead, advanced a new test for distinguishing between those suits against State officials which are to be held suits against the State, and those which are not.

After reviewing the case of *In re Ayers* and holding that it covered the

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jurisdiction of the court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class."

<sup>72</sup> 154 U. S. 362.

<sup>73</sup> 169 U. S. 466.

<sup>74</sup> 180 U. S. 208.

<sup>75</sup> 206 U. S. 46.

<sup>76</sup> 172 U. S. 516.

instant case, the court said: "It is to be observed that neither the attorney-general of Alabama nor the solicitor of the eleventh judicial circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1885." After citing the cases relied upon by the petitioner,<sup>77</sup> the court continued: "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney-general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

### § 907. *Ex Parte Young*.

In *Ex parte Young*<sup>78</sup> a further extension of the authority of the Federal courts to enjoin the execution by State officials of a State law alleged to be unconstitutional was made necessary. In this case a maximum freight rate law had been enacted. No State officers were especially charged by the law with the enforcement of the act, and, therefore, the only opportu-

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<sup>77</sup> *Poindexter v. Greenhow* (114 U. S. 270); *Allen v. Railroad* (114 U. S. 311); *Pennoyer v. McConaughy* (140 U. S. 1); *In re Tyler* (149 U. S. 164); *Reagan v. Trust Co.* (154 U. S. 362); *Scott v. Donald* (165 U. S. 58); *Smyth v. Ames* (169 U. S. 466).

<sup>78</sup> 209 U. S. 123.



nity offered the railway companies to contest the constitutionality of the law, was upon a petition for an injunction, or by refusing obedience to its provisions, and raising the point when action should be brought against them to enforce the penalties prescribed by the law for its violation. But this latter mode was, by the enormous penalties which were provided, made practically unavailable. Under the circumstances a lower Federal court issued an injunction restraining the attorney general from instituting any proceedings to enforce the law; this injunction was violated by that officer, an order was issued by the circuit court directing the attorney general to show cause why he should not be punished for contempt, that officer denied the jurisdiction of the court, and on petition for writs of habeas corpus and certiorari the case was brought before the Supreme Court. That tribunal held the rate law, by the enormous penalties which it imposed as the result of an unsuccessful attempt to test its validity, unconstitutional upon its face, without regard to the question of the insufficiency of the rates. "We have, therefore," said the court, "upon this record the case of an unconstitutional act of the State legislature and an intention by the attorney-general of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings."

As to the case of *Fitts v. McGhee* the court denied that it overruled the doctrine of *Reagan v. Farmers' Loan & Trust Co.* or of *Smyth v. Ames*. In the *Fitts* case, the court said, the State officer who was made a party bore no close official connection with the statute in question, and the making of him a party defendant was there a simple effort to test the constitutionality of the law in a way that, upon principle, could not be done. The court then went on to state that the true doctrine is that while, in making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is necessary that such officers must have some connection with the enforcement of the act ("or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party"), it is not necessary that such duty shall be declared in the act which he is called upon to enforce. "The fact that the State officer by virtue of his office has some connection with the enforcement of the act is the important and material

fact, and whether it arises out of the general law or is specially created by the act itself is not material so long as it exists."

To the objection that the injunction was an interference with the discretionary power of the attorney general as to the enforcement of the act, the court pointed out that no affirmative action of any nature was directed. "The officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he had no legal right to do is not an interference with the discretion of an officer." <sup>79</sup>

### § 908. Other Cases Enjoining State Officials.

It has been seen that in *Fitts v. McGhee* and in *Ex parte Young* the court justified the use of the court's injunctive power to prevent officials of a State from executing laws of the State alleged to be in contravention of the Federal Constitution, instead of leaving this fact to be set up as a defence by a defendant when proceeded against because of violation of those laws. In later cases the use of injunctions in this way has been repeatedly upheld and, in some instances, under circumstances which, it would seem, were not as exceptional or as imperative as were those in the *Young* case.

In *Wadley Southern R. Co. v. Georgia* <sup>80</sup> the circumstances were substantially similar to those in the *Young* case, namely, the provision by the State law under attack of such excessive penalties as to make it an undue hardship for one to test its constitutionality by a refusal to obey it.

In *Truax v. Raich* <sup>81</sup> an alien was permitted to test the constitutionality of a State alien labor law, by injunction proceedings against the attorney general and county attorney, restraining them from enforcing the law, upon the ground that such enforcement would result in the immediate discharge of the complainant from employment, although such employment was one at will rather than for a term. The Supreme Court, without referring to any exceptional circumstances as being present, declared that equitable jurisdiction may be employed to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property or of the right to earn a livelihood, and said: "As the bill is framed upon the theory that the act is unconstitutional, and that defendants, who are public officers concerned with the enforcement of the laws of the State, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class

<sup>79</sup> See also *Western Union Tel. Co. v. Andrews* (216 U. S. 165); *Herndon v. Chicago, R. I. & P. R. Co.* (218 U. S. 135); *Ludwig v. Western U. Tel. Co.* (216 U. S. 146).

<sup>80</sup> 235 U. S. 651.

<sup>81</sup> 239 U. S. 33.

of cases was removed by the decision in *Ex parte Young*<sup>82</sup> which has been repeatedly followed.”<sup>83</sup>

In *Greene v. Louisville & I. R. Co.*<sup>84</sup> the doctrine of *Ex parte Young* was again affirmed and applied in justification of an injunction to enjoin action looking to the enforcement of taxes upon the intangible property of a public service corporation, it being alleged that this property was unduly discriminated against by reason of the systematic undervaluation of other taxable property, and that the illegal valuation of the corporation's property constituted a cloud and lien upon that property, and that, unless action under the law were restrained, numerous and vexatious suits would be instituted to foreclose the loan, together with other civil or criminal proceedings. The court pointed out that, as held in *Reagan v. Farmers' L. & T. Co.*,<sup>85</sup> the right to employ injunctive process was not confined to cases in which the enforcement of unconstitutional State statutes is involved, but applies also in cases in which unconstitutional action under color of a constitutional statute is threatened.

In *Louisville & Nashville R. Co. v. Greene*<sup>86</sup> the court said that if what had been said in *Coulter v. Louisville & Nashville R. Co.*<sup>87</sup> could be held to indicate that an injunction could, under no circumstances, be awarded with respect to State taxes, it was to be deemed to have been overruled by *Raymond v. Chicago Union Traction Co.*<sup>88</sup> where the collection of taxes based upon an unconstitutional assessment had been enjoined.

In *Illinois Central R. Co. v. Greene*<sup>89</sup> an injunction restraining the collection of State taxes was awarded under circumstances substantially similar to those in *Greene v. Louisville & I. R. Co.*<sup>90</sup>

Again, in *Looney v. Crane Co.*,<sup>91</sup> the enforcement of an unconstitutional State tax law was enjoined.

In *Public Service Co. of Northern Illinois v. Corboy*<sup>92</sup> injunctive proceedings were sanctioned against a State officer with reference to a State

<sup>82</sup> 209 U. S. 123.

<sup>83</sup> Citing *Ludwig v. Western Union Tel. Co.* (216 U. S. 146); *Western Union Tel. Co. v. Andrews* (216 U. S. 165); *Herndon v. Chicago, R. I. & P. R. Co.* (218 U. S. 135); *Hopkins v. Clemson Agricultural College* (221 U. S. 636); *Philadelphia Co. v. Stimson* (223 U. S. 607); *Home Tel. & Tel. Co. v. Los Angeles* (227 U. S. 278).

In the instant case Justice McReynolds dissented, saying: "If *Ex parte Young* and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by State legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they ought to be overruled in that regard."

<sup>84</sup> 244 U. S. 499.

<sup>85</sup> 154 U. S. 362.

<sup>86</sup> 244 U. S. 522.

<sup>87</sup> 196 U. S. 599.

<sup>88</sup> 207 U. S. 20.

<sup>89</sup> 244 U. S. 555.

<sup>90</sup> 244 U. S. 499.

<sup>91</sup> 245 U. S. 178.

<sup>92</sup> 250 U. S. 153.

drainage law which, among other provisions, gave to the courts of the State certain functions with regard to its enforcement. The Supreme Court held that the instant injunctive proceedings did not come within the prohibition of Section 265 of the Federal Judicial Code with regard to the staying of proceedings in State courts. As to this the court said: "It is certain that the prohibitions which the statute imposes secure only the right of State courts to exercise their judicial power. . . . This is the necessary result of the ruling in the *Prentis* case,<sup>93</sup> by which it is made certain that, although a State may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by the exertion of such right draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the constitution."

In *Massachusetts State Grange v. Benton* <sup>94</sup> the court deemed it necessary to point out that it was not proper in all cases to test the constitutionality of State laws by enjoining their enforcement, and that this process would be sanctioned only in the case of statutes whose unconstitutionality was reasonably free from doubt, and whose enforcement would lead to great and irreparable injury.<sup>95</sup>

In *Pullman Co. v. Knott*,<sup>96</sup> it was held that the expiration of the term of office of an official against whom suit had been brought to enjoin him from taking official action under a State law would necessitate the dismissal of the bill, in the absence of a statute providing otherwise.<sup>97</sup>

### § 909. Assessment of Costs Against States.

In *Fairmont Creamery Co. v. Minnesota* <sup>98</sup> it was held that a State which had properly been made a defendant in a writ of error to review a criminal conviction which included the constitutionality under the Federal Constitution of the statute under which the conviction had occurred, might, if defeated, be taxed with costs in accordance with Rule 29, Section 3, of the Supreme Court, and as authorized by act of Congress of March 3, 1911.<sup>99</sup> The court after conceding that a sovereign State cannot, without its consent, be taxed with costs in either civil or criminal

<sup>93</sup> *Prentis v. Atlantic Coast Line* (211 U. S. 210).

<sup>94</sup> 272 U. S. 525.

<sup>95</sup> Citing *Cavanaugh v. Looney* (248 U. S. 453); *Hygrade Products Co. v. Sherman* (266 U. S. 497); and *Fenner v. Boykin* (271 U. S. 240).

<sup>96</sup> 243 U. S. 447.

<sup>97</sup> Citing *Pullman Co. v. Croom* (231 U. S. 571), in which a long line of cases to this effect are reviewed and approved.

<sup>98</sup> 275 U. S. 70.

<sup>99</sup> 36 Stat. at L. 1162.

cases,<sup>100</sup> said: "But is the State [of Minnesota] to be regarded as the sovereign here? This court is not a court created by the State of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the State's consent, but by virtue of a law, to which it is subject. Though a sovereign in many respects, the State when a party to litigation in this court loses some of its character as such."

**§ 910. Statutory Regulation of Injunctions from Federal Courts Restraining State Officials.**

Sections 265 and 266 of the Judicial Code provide:

"SEC. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

"SEC. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under or pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunc-

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<sup>100</sup> *United States v. Barker* (2 Wh. 395); *Ruside v. Walker* (11 How. 272); *The Antelope* (12 Wh. 546); *United States v. Boyd* (5 How. 29).

tion, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The foregoing provisions date, in the main, from 1911.

## CHAPTER LXXVIII

### SUITS AGAINST THE UNITED STATES

#### § 911. The Arlington Case: *United States v. Lee*.

In 1882 was decided the famous case of *United States v. Lee*.<sup>1</sup> The facts upon which the case was based were these: The Robert E. Lee homestead, the Arlington Estate, had been for ten years in possession of the United States under a title acquired by sale for non-payment of taxes. The plaintiff, heir of Robert E. Lee, claiming that this title was an invalid one, brought suit in ejectment against the Federal officers in charge of the property to recover possession of it. The United States, by its Attorney General, intervened for the purpose of setting up its title and moved that the suit be dismissed as in effect a suit against itself. Upon appeal to the Supreme Court of the United States that court, upon the first hearing, eight judges sitting, divided equally upon the point whether the suit was to be regarded as a suit against the United States and, therefore, beyond judicial cognizance, and ordered a second hearing before a full court of nine justices. By a bare majority of five to four, it was held upon the second hearing that, though the property was claimed by the United States, the suit might be maintained against the Federal officers in possession of the property to determine whether or not the Federal title which they alleged to support them in their possession was a valid one, and that, if not valid, they might be ejected. Justice Miller rendered the majority opinion.

After a review of the previously decided cases, in which especial emphasis was laid upon the cases of *United States v. Peters*,<sup>2</sup> *Meigs v. McClung*,<sup>3</sup> and *Osborn v. Bank of the United States* <sup>4</sup> which, it was declared, governed the case at bar, Justice Miller went on to state what was after all to be considered the real ground upon which the suit was sustained. This was, that it was not in consonance with the general principles of American political philosophy to hold that the citizen could not be protected against an unconstitutional act of his State.

"It is not pretended, as the case now stands," said he, "that the President had any lawful authority to do this, nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is abso-

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<sup>1</sup> 106 U. S. 196.

<sup>2</sup> 5 Cr. 115.

<sup>3</sup> 9 Cr. 11.

<sup>4</sup> 9 Wh. 738.

lutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation. . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of that law and are bound to obey it. . . . It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court: Stop here; I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the Government, to which by the Constitution this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

#### § 912. The Doctrine of *United States v. Lee* Applied to a State.

In *Tindal v. Wesley* <sup>5</sup> the doctrine of *United States v. Lee* was applied to a State of the Union, the court in its opinion saying: "Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent. . . . But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. . . . It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its right to the determination of the court in the case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be

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<sup>5</sup> 671 U. S. 204.



brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

### § 913. Suit Maintainable Only Where the Action Against the Officer is a Possessory One.

This language in *Tindal v. Wesley* causes the doctrine declared in *United States v. Lee* to appear more plainly to be that the court still holds to the doctrine that any suit against officers of a State, the judgment or decree in which will be inclusive of the rights of the State, will be regarded as a suit against the State. Whence it follows that an action of ejectment against persons in possession of property title to which is claimed by the State, or alleged by the defendants to be in the State, will be considered to be not a suit against the State only in those cases where there is failure to produce at least *prima facie* evidence of title in the State, and in these only if the action of ejectment is treated as a possessory one and not one determining title.

This latter principle was definitely stated in *Stanley v. Schwalby*,<sup>6</sup> in which an action of ejectment against persons holding property for the State was held to be a suit against the State, because in that State such an action was regarded as one determining title. With reference to the doctrine declared in the *Lee* case the court emphasized the fact that the judgment affirmed was simply that the plaintiffs recover against the individual defendants the possession of the property in controversy and costs, "and," the court declared, "this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers." <sup>7</sup>

### § 914. Later Cases.

The latest judicial phases of the suability of the United States are to be found in *Belknap v. Schild*,<sup>8</sup> *Minnesota v. Hitchcock*,<sup>9</sup> *Oregon v. Hitch-*

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<sup>6</sup> 162 U. S. 255.

<sup>7</sup> In *Cunningham v. Macon & B. R. R. Co.* (109 U. S. 446), the court, defining the doctrine of the *Lee* case, said: "The action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore possession to the plaintiff as part of the judgment. . . . The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers and turned them out of their unlawful possession." See also *Carr v. United States* (98 U. S. 433); and *Hussey v. United States* (222 U. S. 88), in which it was held that a judgment of ejectment against an officer of the United States in possession of property did not estop the United States in a subsequent action from contesting the title to the property.

<sup>8</sup> 161 U. S. 10.

<sup>9</sup> 185 U. S. 373.

cock,<sup>10</sup> and *International Postal Supply Co. v. Bruce*.<sup>11</sup> In the first of these cases an injunction was sought against the commandant of a United States navy yard to prevent the use there of a caisson gate contrary to the patent rights of the plaintiff. The injunction was denied.

The court, after holding that there was a distinction between a property right in an article which infringed a patent right and that patent right itself, and that, thus, though the issuance in pursuance of an act of Congress of a patent right creates a right in the patentee against the United States as well as against individuals, there is nothing to prevent the United States becoming the owner of the article that infringes a patent right, continued: "In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defence and general welfare; therefore the United States was an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

In *International Postal Supply Co. v. Bruce* <sup>12</sup> an injunction was asked to restrain a Federal postmaster from using a leased machine which infringed a patent owned by the plaintiff. Again the relief asked for was refused, the court holding that the United States, though not the owner of the machine, had a property right—a right *in rem*—in it, and was in possession, and that, therefore, the case was governed by *Belnap v. Schild*.<sup>13</sup>

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<sup>10</sup> 202 U. S. 60.

<sup>11</sup> 194 U. S. 601.

<sup>12</sup> 194 U. S. 601.

<sup>13</sup> Justice Harlan rendered a dissenting opinion, maintaining as he had in a dissent in *Belnap v. Schild*, that, under the doctrine declared in *United States v. Lee*, the court

In *Minnesota v. Hitchcock*<sup>14</sup> suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office of the United States, to restrain them from selling certain lands in the Indian reservation. The suit was held to be one against the United States, but was entertained by the court on the ground that by virtue of an act of Congress the United States had consented to be sued. In *Oregon v. Hitchcock*,<sup>15</sup> however, in which suit was brought to restrain the patenting to individuals of certain lands and a decree establishing the title of the State of Oregon to them, the court declined jurisdiction, no statutory consent of the United States to suit appearing.

In *Hooe v. United States*<sup>16</sup> it was held that the owners of a building in which quarters had been rented to the United States, could not maintain a suit against the United States in the Court of Claims for rent for other quarters in the building used by the United States without the plaintiff's consent. The ground upon which this claim was rested was that there was an implied contract to pay upon the part of the United States, and also that the United States was constitutionally obligated to make compensation for private property taken for a public use. The court referred to statutes<sup>17</sup> which made it plain that the Secretary of the Executive Department concerned had been without power to make any contract for rent in excess of the appropriations made by Congress. The court said: "If an officer, upon his own responsibility, and without the authority of Congress, assumes to bind the Government, by express or implied contract to pay a sum in excess of that limited by Congress for the purpose of such a contract, the contract is a nullity, so far as the Government is concerned, and no legal obligation arises on its part to meet its provisions." As to the

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would be empowered to enjoin the defendants individually. "I am of the opinion," he said, "that every officer of the government, however high his position, may be prevented by injunction, operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when the government itself cannot be made a party of record.

"The courts may, by mandamus, compel a public officer to perform a plain, ministerial duty prescribed by law; and that may be done, although the government itself cannot be made a party of record. Can it be possible that the court is without authority to enjoin the same officer from doing a direct, affirmative wrong to the property rights of the citizen, upon the ground that the government whom he represents, and in whose interest he is acting, is not and cannot be made a party of record? The present decision—erroneously, I take leave to say—answers this question favorably to the defendant. But that answer cannot, I submit, be made consistently with the declaration which this court has often repeated, that no officer of the law, however high his position, can set that law at defiance with impunity; that the government, as well as the citizen, is subject to the Constitution, and therefore cannot legally appropriate or use a patented invention without just compensation any more than it can appropriate or use, without compensation, land that it had patented to a private purchaser."

<sup>14</sup> 185 U. S. 373.

<sup>15</sup> 202 U. S. 60.

<sup>16</sup> 218 U. S. 322.

<sup>17</sup> Rev. Stat., Sections 3679 and 3732.

claim of a constitutional obligation upon the part of the United States to make just compensation for private property taken for a public use, the court said: "The argument is ingenious, but it is unsound. It cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, unless such claim be either expressly or by necessary implication authorized by some valid enactment of Congress. . . . If an officer of the United States assumes, by virtue alone of his office, and without the authority of Congress, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government, 'founded upon the Constitution.' It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the government, and not against individual or public officers proceeding without the authority of legislative enactment."

In *United States ex rel. Goldberg v. Daniels*<sup>18</sup> it was held that the inability to make the United States a party prevented the maintenance of an action in mandamus to require the Secretary of the Navy to deliver to the highest bidder a cruiser which had been condemned and offered for sale. "The United States," said the court, "is the owner in possession of the vessel. It cannot be interfered with behind its back, and, as it cannot be made a party, this suit must fail."<sup>19</sup>

In *Philadelphia v. Stimson*<sup>20</sup> it was held that the immunity of the United States from suit would not prevent an action from being maintained to restrain the Secretary of War from causing criminal proceedings to be instituted against a riparian owner because of the reclamation and occupation of his own land outside of prescribed harbor limits, when his rights of property had been wrongfully invaded in fixing such limits. The complainant, it was held, was not asking the court to interfere with the official discretion of the Secretary, but to prevent an abuse of power.

In *Louisiana v. Garfield*<sup>21</sup> it was held that a suit to establish title of the State of Louisiana to certain lands which it claimed under statutes of the United States, and to enjoin the Secretary of the Interior from making different disposition of the lands, could not be maintained since there were involved questions of law and of fact upon which the United States would have to be heard and therefore have to be made a party defendant.<sup>22</sup>

In *Louisiana v. McAdoo*<sup>23</sup> it was held that the immunity of the United

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<sup>18</sup> 231 U. S. 218.

<sup>19</sup> Citing *Belknap v. Schild* (161 U. S. 10); *Int. Postal Supply Co. v. Bruce* (194 U. S. 601); *Oregon v. Hitchcock* (202 U. S. 60); and *Naganob v. Hitchcock* (202 U. S. 473).

<sup>20</sup> 223 U. S. 605.

<sup>21</sup> 211 U. S. 70.

<sup>22</sup> To the same effect is *New Mexico v. Lane* (243 U. S. 52).

<sup>23</sup> 234 U. S. 627.

States prevented a suit upon the part of the State as a producer of sugar through its operation of sugar plantations and mills, to review the official judgment of the Secretary of the Treasury as to the rate of duty to be exacted under the Federal tariff acts and under a commercial treaty with Cuba.<sup>24</sup>

In *Western Union Telegraph Co. v. Poston*<sup>25</sup> it was held that an action for damages caused by negligent delay in the transmission of a message by a telegraph company while under the control of the United States Government could not be maintained in the absence of permissive congressional action. "If," said the court, "Congress has omitted to provide adequately for the protection of rights of the public, Congress alone can provide the remedy." As to whether an action might be brought in the Court of Claims under the Tucker Act, the court declared that it expressed no opinion.

In *Sloan Shipyards Corp. v. United States Shipping Board*<sup>26</sup> it was held that a private corporation created under the laws of the District of Columbia by the United States Shipping Board, in pursuance of authority given it by congressional statute, might be sued although the United States held all the stock of the corporation. Before this, in *United States v. Strang*,<sup>27</sup> it had been held that the United States Shipping Board Emergency Fleet Corporation was to be regarded as an entity separate from the United States.

#### § 915. Statutory Consent of the United States and of the States to Be Sued.

The United States by act of Congress and various of the States of the Union by constitutional or statutory provision, have consented to be sued by individuals as to specified matters.<sup>28</sup>

In practically all cases this suability has been limited to actions in contract, express or implied. Almost never have they rendered themselves pecuniarily responsible for the tortious acts of their agents. From a viewpoint of strict equity, and the general doctrine governing the responsibility of the principal for the acts of his agents, it might seem strange that claims of the individual against his State based upon contract are allowed to be adjudicated, whereas those based upon tort are not; in other words, that, the more wrongful and illegal the acts of the agents, the less liable is his principal. This state of the law, however, is a logical and necessary outcome of the general principle of American and English law that an *ultra*

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<sup>24</sup> Cf. *Wells v. Roper* (246 U. S. 335).

<sup>25</sup> 256 U. S. 662.

<sup>26</sup> 258 U. S. 549.

<sup>27</sup> 254 U. S. 491.

<sup>28</sup> The exemption of the United States from suit may be waived only by legislative act and not by the secretary of war or the attorney general or any other officer not expressly authorized so to do. *Stanley v. Schwalby* (162 U. S. 255).

*vires* act of a public official is not the act of his government, but is a private act for which he may be held civilly and criminally responsible.<sup>29</sup>

**§ 916. Suits against Vessels Owned, Requisitioned, or Chartered by the United States.**

Since early times, under the admiralty law of the United States, a ship has been differentiated from its owner and treated as itself an actor and responsible party.<sup>30</sup> Under this theory, proceedings against the vessel, irrespective of who are its owners might be, it would seem that ships owned, requisitioned or chartered by the United States would not be regarded as suits against the United States.<sup>31</sup> However, it is established that a vessel of the United States, even though used for ordinary commercial purposes, may not be libelled, such a proceeding being held precluded by the immunity of the United States from suit.<sup>32</sup> The court, however, in *The Siren* pointed out that the inability to enforce a claim against a public vessel is not inconsistent with the existence of the claim itself, and can therefore be enforced if, and when, the vessel becomes subject to the jurisdiction and control of the courts.<sup>33</sup> In this case the vessel, by capture, had become

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<sup>29</sup> For an argument as to the justice as well as the expediency of holding the sovereign State liable for the torts of its agents, especially when it acts as the owner of, or in relation to, private property, see article by Professor Ernst Freund entitled "Private Claims against the State," in *Political Science Quarterly*, VII, 625. Professor Freund says: "The principal torts which may be imputable to the government in connection with its private relations, are negligence, non-compliance with statutory regulations, nuisance, trespass, and disturbance of natural easements. It is characteristic of these torts that they violate obligations which are cast by law upon the ownership or occupation or control of property, that they are sometimes not directly attributable to a specific act of any particular agent, and that the existence of the wrongful condition is usually of some benefit to the owner. The liability of the State in these cases is demanded not only by justice but by the logic of the law."

<sup>30</sup> "Whatever may be the English rule . . . the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owners or charterers." *The Barnstable* (181 U. S. 464). See also *The Malek Adhel* (2 How. 210).

<sup>31</sup> Under general international law and comity the ships of war and their cargoes are exempt from local process and arrest. *The Santissima Trinidad* (7 Wh. 283). The same immunity attaches to government transports, although not armed. *The Pampa* (245 Fed. Rep. 137); *The Maipo* (252 Fed. Rep. 627). And also to other public vessels, such as light ships. *Briggs v. Lightboats* [11 Allen (Mass.) 157].

<sup>32</sup> *The Siren* (7 Wall. 152). In this respect the practice of the United States is not as liberal as that of England. Formerly, in England, it was held that, in cases of damage done by vessels belonging to the Crown remedy might be sought against their commanders. The present practice, however, is to file a libel *in rem* upon which the court directs the Registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the Crown, which is almost always done. The later proceedings are then the same as in other cases in which the Crown is not concerned.

<sup>33</sup> For a reaffirmation of this see *Workman v. New York City Mayor, etc.* (179 U. S. 552).

the property of the United States, and had been condemned and sold and the proceeds deposited with the Assistant Treasurer of the United States, but were still subject to the order of the prize court. Under these circumstances the Supreme Court held that a lien for damages against the vessel arising out of a collision in which *The Siren* had been at fault, might be paid out of the proceeds from its sale before they were distributed to its captors as then provided by law. The argument was that when the United States, had, as actor, asked that the captured vessel be condemned and sold, it had made it subject to all claims which existed upon the vessel subsequent to its capture.

It would seem that the ruling in *The Siren* implied or carried the doctrine that a lien will attach to a vessel, even when owned and operated by the United States, and, though unenforceable against the vessel so long as it remains the property of the United States, can be enforced when the vessel ceases to be thus owned and immune from libel. However, in the *Western Maid* <sup>34</sup> the court refused to recognize this, and held, in effect, that a legal liability on the part of a vessel cannot be created while a vessel is in the possession of the United States. The court, speaking through Justice Holmes, said: "The only question really open to debate is whether a liability attached to the ships which, although dormant while the United States was in possession, became enforceable as soon as the vessels came into hands that could be sued. . . . The United States has not consented to be sued for torts, and therefore it cannot be said that, in a legal sense, the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. . . . Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." <sup>35</sup> The only attempt made by the court to distinguish this ruling from that stated in *The Siren* was that, in that case, the United States, by coming into court, was to be assumed to have consented to submit to just claims of third persons in respect of the same subject matter, and that while, in that case, the court had spoken of such claims as unenforceable liens, that had been "little more than a mode of expressing the consent of the sovereign power to see full justice done in such circumstances," and that "it would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice when the sovereign came into court." <sup>36</sup>

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<sup>34</sup> *United States v. Thompson* (257 U. S. 419).

<sup>35</sup> This case was one of petition for prohibition to prevent District Courts of the United States from exercising jurisdiction of proceedings *in rem* for collisions which occurred while the vessels libeled were owned absolutely or *pro hac vice* by the United States and operated in the public service.

<sup>36</sup> Justice McKenna filed a strong, one might even say a vehement, dissenting opinion, concurred in by Justices Day and Clarke, in which, with regard to the attempt in the prevailing opinion to escape from the doctrine of *The Siren*, he said: "A gloss is attempted

In *Luckenbach S. S. Co. v. The Thekla*,<sup>37</sup> the court, while refusing to overrule *The Western Maid*, nevertheless did recognize that a tort could be committed by a vessel while in the possession of the United States. In this case the *Luckenbach S. S. Company* had libeled the barque *Thekla* for a collision with one of the company's vessels. The *Thekla* obtained a stay until security for a cross-libel upon its own part was given. The United States intervened and was made a party, standing on the Steamship Company's libel, and claiming "without submitting itself to the jurisdiction" of the court, possession and ownership of the Company's vessel at the time the libel was filed. This vessel, the *F. J. Luckenbach*, was held to be solely at fault. The United States, relying upon *The Western Maid*, asserted that the collision had inflicted no legal wrong, that there could therefore be no claim against the United States, and, therefore, that there could be no counterclaim. The court, after referring to *The Western Maid* and other cases, said: "We do not qualify the foregoing decisions in any way, but nevertheless are of opinion that the District Court had power to enter a decree for damages. When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libeled by the United States were the vessel in other hands, the moral right of the claimant is recognized. . . . The doubt arises in this case not from the absence of a maritime lien, but from the fact that the counterclaim is not against *The Thekla*, libeled by the United States, but for affirmative relief against a different vessel,—the *F. J. Luckenbach*. There certainly is a strong argument for regarding this claim as standing no better than those dealt with in the cases cited by the Government. But we are of opinion that this is to construe the submission of the United

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to be put upon it, which we think is unjustified and inaccurate unless, indeed, it can be asserted that the writer of the opinion did not know the meaning of the words he used, and that the members of the court who concurred with him were equally deficient in understanding. And their insensibility to what the words conveyed had no excuse. A dissenting justice tried to bring their comprehensive import to understanding, proclaimed, indeed, the words had the extent and consequence that the court now says was not intended nor accomplished. . . . The case was commented on in *The Davis* (*United States v. Douglas*, 10 Wall. 15), and the gloss now put upon it rejected. . . . So, again, in *Workman v. New York* (179 U. S. 552), where it is said, Chief Justice White delivering the opinion of the court, after an exhaustive review of cases, such as he usually gave, 'It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction.' "

<sup>37</sup> 266 U. S. 328.



States too narrowly. A collision involves two vessels. . . . If both parties were in fault the entire damage would be divided equally between them, and it could not be argued that the United States could avoid the consequences of the rule, although the damage to the other vessel might bar its recovering anything. This shows that the subject matter is the collision, rather than the vessel first libeled. . . . It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

The severity of the American rule with regard to the right to proceed against vessels owned, requisitioned or chartered and operated by the United States has been much mitigated by statute. Thus, when the Emergency Fleet Corporation was created, it was provided that ships purchased, chartered or leased by it and employed solely as merchant vessels should be subject to the admiralty law irrespective of the interest of the United States in them.<sup>38</sup>

In *re* Petition of the United States,<sup>39</sup> as owner of the steamship Lake Monroe, for a writ of prohibition to prevent a United States District Court, sitting in admiralty, from directing the arrest of the steamship to satisfy a claim for damages against it arising out of a collision, it was held, in substance, that every vessel turned over to the United States Shipping Board became subject to Section 9 of the Shipping Board Act of 1916.<sup>40</sup>

Under this Statute, as thus applied not only to vessels constructed or acquired under that particular act, but to all other vessels operated as merchant vessels by the Emergency Fleet Corporation which had been organized by the Shipping Board, the merchant vessels operated by the United States became subject to libels for damages arising out of collisions, for salvage services, for cargo damages, and personal injuries, and, under such libels, to seizure and arrest. To meet this situation Congress enacted the law of March 9, 1920, which provides that no vessel or cargo owned or possessed by the United States or by any corporation in which the United States or its representative shall own the entire outstanding capital stock, shall be liable to arrest or seizure by judicial process in the United States, that is, that actions *in rem* against them shall not be entertained. In place of the relief thus denied, the act provides that proceedings

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<sup>38</sup> Shipping Board Act of September 7, 1916, 39 Stat. at L. 730. This provision was reenacted by the statute of July 15, 1918, 40 Stat. at L. 900.

<sup>39</sup> 250 U. S. 246.

<sup>40</sup> Paragraph 2 of this section provided: "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgages, lien, or other interest therein."

*in personam* against the United States or the Shipping Board or Emergency Fleet Corporation may be brought, and money judgments rendered.<sup>41</sup>

By Section 4 of the act of March 9, 1920, it is provided: "That if a private owned vessel not in the possession of the United States or of such corporation (the capital stock of which is entirely owned by the United States) is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its attorney general or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act."

### § 917. Acts of State.

In England the term "Act of State" would not appear to have an exact meaning.<sup>42</sup> At any rate, it is there often so employed as to include matters which, in the United States, are termed "political." However, when employed in a narrower and more technical sense an "Act of State" is one done with the authority of the Crown outside British territory, and affecting aliens.<sup>43</sup>

The English doctrine of "Act of State" in its special sense would appear to be that an alien has no right to judicial relief in case he is injured by the

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<sup>41</sup> Section 7 of this act also provides that if any Shipping Board vessel or its cargo shall be arrested in a process in a foreign court, the Secretary of State may, in his discretion, direct the nearest American consul to claim immunity, and to execute a bond on behalf of the United States for the release of the ship or cargo; and also, in case of suits against the masters of such vessels the consul may enter appearance of the United States and pledge its credit for the payment of any judgments and costs which may be entered against them.

<sup>42</sup> Cf. Halsbury's *Laws of England*, Vol. XXIII, p. 304.

<sup>43</sup> Cobbett says: "The term 'Act of State' in English law strictly denotes a public act, or an act done by or under the authority of the Crown, outside the British territory, and affecting aliens." *Leading Cases on International Law*, 3d ed., Vol. I, p. 18.

Stephen says: "I understand by an Act of State an act injurious to the person or property of some person who is not at the time of the act a subject of Her Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty." *History of Criminal Law*, Vol. II, p. 61. A little further on (p. 64) Stephen says: "In order to avoid misconception it is necessary to observe that the doctrine as to Acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subject there can be no such thing as an Act of State."

In *Johnstone v. Pedlar* (2 Ap. Cas. 262) the House of Lords in 1921 held that a friendly resident alien was in the same position as an ordinary subject and that, therefore, there could not be, as to him, an Act of State.

act of a British official, ordered or approved by the British Government, if committed outside British territory, either upon the high seas or within the limits of a foreign State. The leading case upon this point is *Baron v. Denman*,<sup>44</sup> decided in 1840. In that case, which was one of trespass against an alien and committed outside the British dominions, Justice Parke, charging the jury, said: "If the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass."

In the much later case, *Musgrove v. Chun Teeong Toy*,<sup>45</sup> the court held that an alien could not question in an English court the right of a British official to prevent his entrance into British territory.

In *Secretary of State for India v. Kamachu Baije Sahiba*,<sup>46</sup> the court said: "Acts of State can apply only to acts which affect foreigners which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of State."

It is not certain whether this English doctrine has been adopted by the United States courts. Certainly it has not been carefully considered, defined, and then accepted. In a comparatively recent case, however, it would appear that the doctrine was recognized. The Governor General of the Philippine Islands, without legal authority, expelled certain aliens, but his action was later authorized by the Philippine Legislature. Holding that the Governor General thus gained legal immunity for the acts which were illegal at the time they were committed, the Supreme Court said: "It is held in England that an act of State is a matter not cognizable in any municipal court"<sup>47</sup> and that was the purport of the Philippine Act declaring the deportation not subject to question or review."<sup>48</sup>

It is to be observed that here the Supreme Court was not dealing with an act which came within the strict definition of an act of State since it was not one that had been committed outside the territory subject to American political jurisdiction. The propriety of thus referring for support to the British doctrine of act of State is thus highly doubtful. And it may be added that it is logically impossible to square that doctrine with the fundamental principle of American jurisprudence that all public officials, with the exception of the Chief Executive during his term of office, may be held legally responsible for all acts upon their part *ultra vires* at the time of their

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<sup>44</sup> 2 Ex. Rep. 166.

<sup>45</sup> L. R. Appeal Cases, 1891, 272.

<sup>46</sup> Scott's Cas. Int. Law, 397.

<sup>47</sup> Citing *Musgrove v. Pulido* (L. R. & App. Cas., 103, 108).

<sup>48</sup> *Tiaco v. Forbes* (228 U. S. 549).

commission, and that this responsibility cannot be evaded by reference to orders received from official superiors who were without legal authority to give such orders, or by appeal to statutes which the enacting legislatures had no constitutional power to enact.<sup>49</sup>

### § 918. Liability of the State for the Acts of Its Officers.

The doctrine of the non-suability of the State prevents the prosecution of a claim against the United States, whether that claim be founded upon a tort of one of its agents, or is one arising out of a contract.

"No government," said the Supreme Court in *Gibbons v. United States*<sup>50</sup> "has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents. It does not undertake to guarantee to any person the fidelity of the officers whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses which would be subversive of the public interests; . . . The general principle which we have already stated as applicable to all governments, forbids, as a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizens though occurring while engaged in the discharge of official duties."<sup>51</sup>

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<sup>49</sup> It is, however, possible that an alien may not have an opportunity to bring an action against an American official, unless the alien can obtain entrance into the United States and thus furnish the American court with jurisdiction. Thus an alien illegally refused admission to the United States by an American official would not be able to bring the matter before the courts either for the purpose of securing admission or of obtaining damages against the official for his illegal act of exclusion, unless by statute he be given the right. It may be added that this is but an hypothetical case, for American statute law does provide means whereby aliens refused admission to the United States by administrative officials may have their right to enter determined, after a fair hearing, by the courts or by a superior administrative agency. It has been held that they are entitled, in this respect, to "due process of law," even though this may not mean a hearing in a court of law as distinguished from an administrative tribunal.

As regards English law upon this point we find the following declaration in *Musgrove v. Chun Teeong Toy* (L. R. Appeal Cases, 1891, p. 272) in which the Judicial Committee expressed what almost amounted to indignation that it should have been asked to pass upon certain very important imperial constitutional principles at the instance of an alien who had not, by reason of being within British territory, obtained a right to resort to the British courts. The Committee said: "No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he is a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive department there, can maintain an action in a British court."

<sup>50</sup> 8 Wall. 269.

<sup>51</sup> See also *Dooley v. United States* (182 U. S. 222), and authorities there cited.

**§ 919. Legal Liability of Public Officials to Private Individuals Injured by Their Acts; Ultra Vires Acts.**

As has elsewhere been shown in this treatise, a fundamental principle of American law is that the legality of acts of public officers is determined in the ordinary courts according to the same rules that govern the decision of suits between private individuals. Thus, generally speaking, no officer can defend an *ultra vires* or otherwise illegal act by setting up his official position or exhibiting the command of a political superior. This last statement as to the non-applicability of the principle of *respondeat superior* is, perhaps, subject to this qualification, that the order of an administrative superior, *prima facie* legal, though in fact not legal, may be set up in defence of an act commanded by military superiors. In *Re Fair*,<sup>52</sup> decided in 1900, the court said: "The law is that an order given by an officer to his private, which does not expressly or clearly show on its face its illegality, the soldier is bound to obey; and such order is his full protection (citing several cases in the lower Federal courts). The first duty of an officer is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the precious moment for action would be wasted. Its law is that of obedience. No question can be left open of the right to command in the officer, or of the duty of obedience in the soldier. While I do not say that the order given . . . to the petitioners was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding. If, then, the petitioners acted under such order in good faith, they are not liable to prosecution."<sup>53</sup>

The result of the doctrine thus stated is, as will be seen, that an act is defended for the performance of which in fact no legal authority can be produced. Simply the color of authority on the part of the superior giving the command is held a sufficient defence. Clearly common justice, and the practical necessities of administration justify the rule, yet, inasmuch as it does in fact protect an act essentially illegal, the doctrine, if accepted, should be kept within the narrowest possible bounds. Only where there is present no fact which would put the subordinate, as a man of ordinary intelligence, upon his guard, or where the practical necessities of the case leave little or no opportunity for individual judgment in the matter, should the rule be applied. In all other cases, it is to be repeated, the public official is able to defend his act only by showing some existing legal authority for it.

The necessities of the case may require the foregoing doctrine with ref-

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<sup>52</sup> 100 Fed. Rep. 149.

<sup>53</sup> Part of this question is quoted by the court from the decision in *McCall v. McDowell*, Fed. Cas. No. 8,673.

erence to the military arm of government. There not being the same urgency for immediate obedience, the doctrine does not prevail in civil matters. Thus, in *Hendricks v. Gonzales*<sup>54</sup> the order of the Secretary of the Treasury to the Collector of the Port of New York was held not to exonerate him from liability for an act done under it, the court saying: "The questions presented by the assignments of error seem free from doubt. The plaintiff having complied with the condition entitling him to clearance, it was the duty of the defendant as collector of the port, to grant a clearance for the vessel and her cargo, unless he was justified in refusing to do so by some other statutory authority. Neither the Secretary of the Treasury nor the President could nullify the statute, and though the defendant may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afforded him no protection unless they were authorized in law."

### § 920. Criminal Liability of Officials.

As elsewhere pointed out, where the performance of a ministerial duty is commanded by an administrative superior, mandamus will issue to the subordinate compelling obedience thereto.<sup>55</sup> Moreover, in very many cases "the neglect or failure of a public officer to perform any duty he is required to perform is an indictable offence even though no damage was caused by the default, and a mistake as to his powers or with relation to the facts of the case is no protection."<sup>56</sup> This criminal liability is, however, as Professor Goodnow observes,<sup>57</sup> sometimes difficult of enforcement owing to the fact the prosecution of all crime is in the hands of a district attorney or other public prosecutor who is closely affiliated with the administration.

### § 921. Responsibility of Officers for Improper Exercise of Authority; Malice, etc.

Thus far we have been considering the criminal and civil responsibility of public officers for *ultra vires* and otherwise illegal acts. We have now to consider their responsibility to private individuals for acts committed by public officials within the general scope of their respective authorities, but characterized by undue severity, discrimination, or malice.

In general no officer is held responsible in damages to an individual for non-performance or negligent performance of duties of a purely public or political character.

"In order to be made the basis of a claim for damages, the duty, the neglect of which has caused the damage, must be one which the individual

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<sup>54</sup> 67 Fed. Rep. 351.

<sup>55</sup> § 1091.

<sup>56</sup> *Amer. and Eng. Encyc. of Law*, XIX, 504.

<sup>57</sup> *Cases on the Law of Officers*, p. 519, note.

suffering the damage has the right, not as a part of the public, but as an individual to have performed.”<sup>58</sup>

So long as public officers act within the general sphere of their authority, their legal responsibility to private individuals for the manner in which they act, whether their acts be dictated by malice, or characterized by negligence, is very slight.

A case in which this whole subject is comprehensively treated is that of *Spaulding v. Vilas*.<sup>59</sup> In this case Spaulding had charged that the Postmaster-General had, by the issuance of a circular, maliciously injured his business. The court, after holding that the issuance of the circular had not been beyond the general scope of the official authority of the Postmaster-General, declared that he could be subjected to suit because his act had been dictated by malice. The court admitted that the precise point had not been previously determined in the United States, but that a line of cases, English as well as American, supported the doctrine that the higher judicial officers are exempt from responsibility for a malicious exercise of their authority. After an extended review of these cases, the court said:

“We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action, for personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry

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<sup>58</sup> Goodnow, *American Administrative Law*, 402. Cf. Mechem, *Law of Officers*, § 789.

<sup>59</sup> 161 U. S. 483.

in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster-General. The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial. If we were to hold that the demurrer admitted, for the purpose of the trial, that the defendant acted maliciously, that could not change the law."

*A fortiori* it follows from the doctrine declared in *Spaulding v. Vilas* that a public officer acting from a sense of duty in a matter where he is required to exercise discretion, is not liable to an action because of any error of judgment that he may have made.<sup>60</sup>

#### § 922. Responsibility of Judges of Courts of Superior or General Jurisdiction.

That judges of courts of superior or general jurisdiction are not liable to civil suits for judicial acts, even though maliciously or corruptly done, has already been indicated, the cases in point being reviewed by the court in *Spaulding v. Vilas*. This is true even when the acts done are in excess of their jurisdiction, provided it appear that this want of jurisdiction is not clear and unmistakable. Where, however, authority is clearly usurped, action will lie. The doctrine as to this is sufficiently shown in the following words from the opinion in *Bradley v. Fisher*.<sup>61</sup>

"Where there is clearly no jurisdiction over the subject-matter any authority exercised is an usurped authority, and for the exercise of such

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<sup>60</sup> In *Kendall v. Stokes* (3 How. 87), the court said:

"It repeatedly and unavoidably happens, in transactions with the government, that money due to an individual is withheld from him for a time, and payment suspended in order to afford an opportunity for more thorough examination. Sometimes erroneous constructions of the law may lead to a final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland, v. Ld. Palmerston* (J. B. Moore 91; 3 B. & B. 275)."

<sup>61</sup> 13 Wall. 335.



authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil actions for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

In *Voorhees v. Jackson* <sup>62</sup> it was held that a decree of a court with jurisdiction of the *res* and of the parties is not subject to collateral attack even though the court errs as to a case having been made under its inherent power as a court or under its statutory authority. The court said: "The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-

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<sup>62</sup> 10 Pet. 449.

merited reproach to our jurisprudence if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it.”<sup>63</sup>

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<sup>63</sup> This language was quoted with approval in United States, case of *Hine v. Morse* (218 U. S. 493). See also *Fauntleroy v. Lum* (210 U. S. 230), in which it was declared that a judgment could not be collaterally impeached by showing that it was based upon a mistake of law.

## CHAPTER LXXIX

### POWER OF THE SUPREME COURT TO ENFORCE A JUDGMENT AGAINST A STATE<sup>1</sup>

#### § 923. *Virginia v. West Virginia.*

Fortunately, it has never happened that a State has persisted in a refusal to obey a decree rendered against it by the Supreme Court. However, in the long controversy between the State of Virginia and the State of West Virginia with reference to the payment by West Virginia of the proportion of the public debt of Virginia assumed by West Virginia at the time of its separation from Virginia and assumption of a status as a separate State, the obedience of West Virginia was so long delayed, and disobedience so definitely threatened, that it became necessary for the Supreme Court to consider what its powers in the premises were, and what its policy should be.

It has already appeared that, in appropriate cases, the court has issued injunctions to State officials, and, in boundary disputes has awarded to individual States jurisdiction over areas claimed by other States. Disregard of these injunctions would undoubtedly have been followed by proceedings in contempt, and the executive branch of the Federal Government would presumably have given armed assistance, if required, in order to enable the States to which disputed territory was awarded to exercise political jurisdiction over such territory, had the States adversely affected attempted to continue to exercise authority thereover.<sup>2</sup> And,

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<sup>1</sup> For interesting discussions of this subject see the following articles: "Enforcement of Judgments Against a State" by Joseph R. Long in 4 *Virginia Law Review*, 157; "The State as Defendant under the Federal Constitution" by William C. Coleman (now Federal District Judge) in 31 *Harvard Law Review*, 210; and "Coercing a State to Pay a Judgment: Virginia Versus West Virginia," by T. R. Powell, in 17 *Michigan Law Review*, 1.

<sup>2</sup> An instance in which a State has sought to prevent the enforcement of an order of the Supreme Court is that of the State of Pennsylvania with regard to the decree in *United States v. Peters* (5 Cr. 115). In that case, service of attachment having been resisted by the State militia which had been called out by the Governor of the State under authority of the legislature of the State, the Federal marshal appointed a day for the service of the writ and summoned a *posse comitatus* of two thousand men to assist him. The Governor then appealed to the President of the United States, who refused to intervene, whereupon the State ceased to resist the enforcement of the decree and its legislature appropriated the money for its satisfaction.

In the case of *Worcester v. Georgia* (6 Pet. 515) the Supreme Court failed to secure an enforcement of the decree it had issued against State officials, but this was due not to incompetence of the court, but to the refusal of the President of the United States to lend executive aid for the enforcement of the decree that had been entered.

in the next chapter, it will appear that numerous cases suits against individual State officials to compel or prevent action upon their part or to obtain damages because of actions upon their part under color of official authority have been entertained by the Federal courts upon the ground that such suits were not against the States themselves, and, therefore, were not prohibited by the Eleventh Amendment. These suits were maintained upon the ground or theory that the State officials involved had no right, under any valid State law, to do that which they had done or which they threatened to do or to refuse to do. In the suit of Virginia against West Virginia, which, in one form or another, was repeatedly before the Supreme Court, the issue finally narrowed itself down to whether the court was competent to order State officials, as such, to perform acts which their States had not directed them to perform.

It is not necessary to go into details with reference to the suit of the State of Virginia against the State of West Virginia. It is sufficient to say that a decree was finally entered by the Supreme Court for the payment of a large sum of money by West Virginia to the State of Virginia.<sup>3</sup> This was not the first instance in which such a decree had been sought or entered against a State. In *United States v. North Carolina*,<sup>4</sup> the court, without objection upon the part of the defendant as to jurisdiction, had entertained a suit at the instance of the United States against the State of North Carolina to recover interest on certain bonds of that State, but, deciding the case on its merits, the State was held not liable, and, therefore, no question of enforcing a decree for the payment of money by the State arose. In *United States v. Michigan*,<sup>5</sup> also, suit was brought for an accounting, and, the demurrer of the defendant having been overruled, leave to answer was given, with the statement that, if no answer were made, a judgment in favor of the United States should be entered. However, the suit was later dismissed at the instance of the Solicitor General of the United States,<sup>6</sup> and, therefore, no question of enforcement of a money judgment arose.

#### § 924. *South Dakota v. North Carolina.*

In *South Dakota v. North Carolina* <sup>7</sup> the plaintiff sued to compel payment by the defendant of certain of its bonds which were secured by a mortgage of railroad stock owned by the State. Judgment was awarded the plaintiff and an order of foreclosure entered, directing that, if the judgment were not paid, the railroad stock should be sold at public auction on a specified date, after due advertisement, at the east front door of the

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<sup>3</sup> *Virginia v. West Virginia* (238 U. S. 202).

<sup>4</sup> 136 U. S. 211.

<sup>5</sup> 190 U. S. 379.

<sup>6</sup> 203 U. S. 601.

<sup>7</sup> 192 U. S. 286.

capitol building at Washington. The day before the date arrived the defendant State paid the judgment.<sup>8</sup>

In this case the problem of enforcing a money judgment against a State was greatly simplified by reason of the fact that there was property of the State not directly used for a public or governmental purpose which could be sold under order of the court for the payment of the judgment, and, therefore, unless there should not be realized from this sale a sum sufficient for that purpose, it would not be necessary to take further action. But there was the possibility that this necessity might arise, and, therefore, the court felt obligated to consider the general question as to the competence of the court to enter a judgment against the State which would, normally, be followed by the issuance of a writ of execution of some sort against the State. In its opinion, the court said: "We are confronted with the contention that there is no power in this court to enforce such a judgment, and [that] such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money."

The court then went on to admit that "the public property held by any municipality, city, county, or State is exempt from seizure upon execution, because it is held by such corporation not as a part of its private assets, but as a trustee for public purposes"<sup>9</sup> and also, that "a levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."<sup>10</sup>

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<sup>8</sup> Justice Brewer, in a public address (Report of the Lake Mohonk Conference on International Arbitration, 1907, p. 170), has given the following account of this payment: "The day before that fixed for the sale of these bonds the Attorney General of North Carolina came to my house, for I was the organ of the court in delivering the opinion, and said that he had been sent by the Governor to pay the full amount that we had found to be due: that the State did not intend to raise any question as to what could or should be done in case of a deficiency after the sale of the stock, and that inasmuch as the court created by the Constitution and charged with the duty of determining controversies between the States had declared that a certain sum was due from North Carolina to South Dakota he was directed by the State to pay that, every dollar, as well as the costs of the case. And he then and there did so."

<sup>9</sup> Citing *Meriwether v. Garrett* (102 U. S. 472).

<sup>10</sup> Citing *Rees v. Watertown* (19 Wall. 107), and quoting the following from the decision in that case: "We are of opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and second, by the power of the legislative authority only. It is a power which has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority, at once so delicate and so important," (citing *Heine v. Bd. of Levee Comrs*, 19 Wall. 655; and *Meriwether v. Garrett*, 102 U. S. 472).

In *Heine v. Bd. of Levee Comrs.*, suit in chancery was brought against a Board of Commissioners which was a *quasi*-corporation created by the State with authorization to issue bonds to provide for their payment by taxes levied on the real and personal

The court also quoted the following from *United States ex rel. Goodrich v. Guthrie*<sup>11</sup> in which an application had been made for a mandamus against the Secretary of the United States Treasury to compel the payment of an official salary. "The only legitimate inquiry for our determination upon the case before us is this: whether under the organization of the Federal Government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States. This is the question, . . . and its simple statement would seem to carry with it the most startling considerations,—nay, its unavoidable negation, unless this should be prevented by some positive and controlling demand."

Concluding its opinion, the court said that, for the present, it was not necessary to go beyond the entering of a decree for the sale of the interest of the defendant State in the shares of the railway company which constituted a mortgage security for the bonds the payment of which was due, but, that the general question as to the extent of the court's power to secure the execution of a money judgment against a State was before the court, was fully recognized. The court said: "Notwithstanding the embarrassments which surround the question [as indicated in the dicta quoted] it is directly presented, and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties."

### § 925. Judgment Entered against West Virginia.

Thus stood the question when, in 1915, the court entered a judgment for the payment of more than twelve millions of dollars by the State of West Virginia to the State of Virginia due upon an agreement made by the former

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property of the District. The bonds were in default, and the court was asked to direct that a tax be levied by the Board for their payment. The court, refusing this prayer, said: "The power we are here asked to exercise is the very delicate one of taxation. The power belongs in this country to the legislative sovereignty, State or National. In the case before us, the National sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to Levee Commissioners. If that body has ceased to exist (the Commissioners had resigned), the remedy is in the Legislature either to assess the tax by special tax or to vest the power in some other tribunal. It is certainly not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the Legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the legislative functions of the State government."

<sup>11</sup> 17 How. 284.

State at the time it separated from the latter State, but for the payment of which no specific property or revenues of the State had been pledged, and which, as in the case of *South Dakota v. North Carolina*, might be attached and sold under a writ of execution.

When Virginia petitioned the court for a writ of execution upon the judgment that had been entered, West Virginia resisted the granting of it upon three grounds, namely: <sup>12</sup> "(1) Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen; (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because, although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States, and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if, in the exercise of jurisdiction, such a judgment was entered."

The court, in its opinion, examined only the sufficiency of the first of these three pleas, saying: "Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion [for the writ of execution] at this time."

Instead of later renewing its prayer for a writ of execution, Virginia moved for leave to file a petition for a writ of mandamus commanding the legislature of West Virginia to levy a tax for the payment of the judgment. This motion to file the petition the court granted. Upon motion of Virginia to discharge this rule,<sup>13</sup> the court, in its opinion, asserted squarely that, under the Constitution, it had the right to enforce its judgment by appropriate remedies, even though the application of such remedies might operate upon the governmental powers of the State. As to the nature of these remedies, the court pointed out that Congress might specifically provide them by legislation, since the debt of West Virginia was founded upon a compact between it and Virginia to which Congress had given its approval;<sup>14</sup> or the court might proceed under powers which it already had.

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<sup>12</sup> 241 U. S. 531.

<sup>13</sup> 246 U. S. 565.

<sup>14</sup> As to this the court said: "It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it to assert the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement."

The court, however, decided that no decisive action need then be ordered, saying: "Impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a State and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a two-fold way having been also pointed out, we are fain to believe that, if we refrain now from passing upon the question stated, we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution." The court thereupon ordered the case to be restored to the docket for further argument upon the following points: (1) The right under the conditions as they existed, to award the mandamus prayed for; (2) if not, the power and duty to direct the levy of a tax; and (3) if means for doing so should be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy, by dealing with the funds or taxable property of West Virginia or the rights of that State, as might secure the execution of the judgment.

The postponed discussion of these questions was never had, the court being later informed by Virginia that West Virginia had provided for the payment of the judgment.<sup>15</sup>

### § 926. Judicial Means to Coerce a State.

The fact that a State may be compelled to pay a money judgment rendered against it has, then, been declared, but, as yet, there is no decision of the Supreme Court as to just what form of coercion may be applied in order to secure this enforcement. However, because of the importance of the question it will be desirable to consider, at least briefly, the possible means of enforcement that exist.

It seems clear that property, if any, owned by the defendant State, and not used by it for public governmental purposes, may be seized and sold.<sup>16</sup> It is probable, however, that, in most cases, it will not be possible to find any such property. Furthermore, it is to be admitted that no clear line of distinction can be drawn between properties held by States for public or governmental purposes and those which are not. This line will have to be drawn in each individual case by the court. The question thus arises whether cash assets of the State on deposit in various banks can be seized.

Whether the court will feel itself justified in issuing a mandamus to the State Treasurer to satisfy a judgment out of the moneys of the State in his custody is very doubtful. As to this there is the strong dictum, *contra*, in *Goodrich v. Guthrie*<sup>17</sup> which has been earlier quoted.

<sup>15</sup> Acknowledgment of satisfaction of the decree was entered on March 1, 1920.

<sup>16</sup> *South Dakota v. North Carolina* (192 U. S. 286).

<sup>17</sup> 17 How. 284; and *Meriwether v. Garrett* (102 U. S. 472).



It is reasonably certain that the Supreme Court will not feel itself competent to direct, through its marshal or other officers, the levying and collection of a tax upon the inhabitants of the State or upon their property for the payment of the judgment, for, here again, the court has repeatedly declared that, from its very nature, a court is not qualified to perform or supervise such an act.<sup>18</sup> It is, however, to be observed <sup>19</sup> that, in the comparatively recent case of *Yost v. Dallas County*,<sup>20</sup> though the court refused, as prayed, to appoint its own officer to apportion and collect a tax for the payment of a judgment rendered by it, all other means of securing payment having been exhausted, nevertheless the court placed this refusal upon grounds that would not apply to judgments rendered against a State by the Supreme Court in the exercise of its original jurisdiction. From the fact that this feature of the case was thus emphasized, it is possible to argue that the court was deliberately seeking to keep open the way to an exercise by itself of the power to direct the levying of a tax in a case such as that of *Virginia v. West Virginia*. Justice Holmes said: "The fundamental consideration for answering these questions is that obligation upon which judgment [in the instant case] was recovered was an obligation under, not paramount to, the authority of the State. It is true that the District Court of the United States had jurisdiction of the suit upon the contract, but the extent of the obligation imposed was determined by the statutes of Missouri, not by the Constitution of the United States or any extraneous source, the Constitution only requiring that the obligation of the contract should not be impaired by subsequent State law. The plaintiff, by bringing suit in the United States court, acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the State, and therefore limited in whatever way the State saw fit to limit it when, so to speak, it contracted to give the remedy. It is established that 'taxes of the nature now in question can only be levied and collected in the manner provided' by statute, and therefore that it is impossible for the courts to substitute their own appointee in place of the one contemplated by the act."<sup>21</sup>

It appears, then, from this language that the court did not rest its refusal to act upon any conceived inherent inability of a court to provide for the levying of a tax, and also that the reasons, as stated, for not acting would not apply to a judgment rendered in a case in which action upon the part of a State official arises from an obligation under the Federal Constitu-

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<sup>18</sup> *Rees v. Watertown* (19 Wall. 107); *Heine v. Bd. of Levee Comrs.* (19 Wall. 655).

<sup>19</sup> As is pointed out by Professor Powell in the article to which reference is made at the head of this chapter.

<sup>20</sup> 236 U. S. 50.

<sup>21</sup> Citing *Seibert v. United States* (122 U. S. 284).

tion. If, then, the court should decide to pursue this doctrine, the possibility of which, at least, if not suggested, is not excluded by the language of the court in *Yost v. Dallas County*, the court might deem itself competent to direct and supervise the collection of a tax upon the people of a State, or upon their property, for the payment of a money judgment rendered against that State at the suit of another State.

That, instead of acting through its own agents, the court would feel itself justified in commanding that the appropriate State officials levy and collect such a tax and pay over its proceeds in satisfaction of the judgment is scarcely likely. There have, of course, been many instances in which the court has commanded State officials to perform specified acts, but only when these have been of a ministerial character, and for the performance of which there has existed valid State authority.<sup>22</sup> In *Supervisors of Carroll Co. v. United States ex rel. Reynolds*,<sup>23</sup> in which the relator, who had secured a judgment against the County of Carroll upon which an execution had been awarded and returned "*nulla bona*," mandamus was prayed to compel the Board of Supervisors of the County to levy a specific tax sufficient to pay the judgment, interest and costs. This writ the Supreme Court, on writ of error, refused to sanction, saying: "It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked."

It is clear, then, from this case, that the court would not seek to compel the levying and collection of a specific tax by officials of the State, unless, (which is not likely), it could find among the statutes of the State some provision that could be construed to direct such a levying and collection. In the case referred to, the court examined the statutes of the State and was unable to find in them such authorization.

There remains the possibility of a mandamus issued by the Supreme Court to the legislature of a State directing it to provide by law for the payment of a money judgment rendered against the State. This, in fact, it has been seen, was the action asked by Virginia at the time of its last appearance before the Supreme Court. The objection to the issuance of such a writ, which immediately presents itself, is that it would command the per-

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<sup>22</sup> That is, valid, when other State laws, which the court finds unconstitutional, are disregarded.

<sup>23</sup> 18 Wall. 71.

formance of an act essentially discretionary in character. This objection Professor Powell has sought to meet, in the article to which reference is made at the beginning of this chapter. He there points out that, under such an order, the legislature would still be free to exercise its discretion as to what means should be provided for the payment of the judgment, namely, by an issue of bonds, or by a tax; and, if by bonds, what kind of bonds; and, if by a tax, what kind of a tax.<sup>24</sup>

It is worth while to indicate that, should a mandamus be issued by the Supreme Court to a State legislature directing that it levy a tax, there would be great difficulty in compelling obedience to it. Should the mandate not be obeyed, against whom would contempt proceedings be instituted? Would all the members of both Houses of the Legislature be held to be in contempt even though a minority in both Houses, or even a majority of one of the Houses, had voted in favor of the required legislation? In other words, would the court feel justified in holding in contempt individual legislators who had, so far as they were individually able, voted for the action required of the legislature by the court's mandamus? Or, what would the action of the court be if the two Houses should refuse to agree upon an identical measure, but each of them should approve measures, adequate for the purpose in view but not identical,—for example, one House approving a measure providing for a bond issue, and the other House a measure providing for the levying of a tax?

With regard generally to the issuance by Federal courts of mandamus to State officials, it may be said that the case of *Kentucky v. Dennison* <sup>25</sup> is by no means an authority for the doctrine that the writ may not be issued to the higher State authorities. In that case a writ to the Governor of a State to surrender a fugitive from justice, upon the demand of the Executive of another State, was refused, but upon the ground that, in the opinion of the court, the words of the Federal Constitution that such a fugitive "shall . . . be delivered up" <sup>26</sup> were not used as mandatory and compulsory, but only as declaratory of a moral duty when Congress should provide the

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<sup>24</sup> Professor Powell quotes the following from Dillon, *Municipal Corporations* (5th ed., p. 2657): "The general rule is this: If the inferior tribunal, corporate body, or public agent or officer has a discretion, and acts and exercises it, this discretion cannot be controlled by mandamus. But if the inferior tribunal, body, officers, or agents refuse to act in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a mandamus will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body or officer."

This as to subordinate officials or bodies. In the case of a mandamus by the Supreme Court to a State legislature to do that which the State is constitutionally obligated by Federal law to do, the legislature, Professor Powell points out, is *quoad hoc*, a subordinate body—subordinate to the Federal Constitution.

<sup>25</sup> 24 How. 66.

<sup>26</sup> Art. IV, Sec. 2, Cl. 2.

mode for carrying it into execution. Also, the court pointed out in that case that the statute which Congress had enacted did not provide any means for compelling the execution of the duty or for the inflicting of any punishment for neglect or refusal on the part of the Executive of a State.

It is to be observed that the Federal Constitution, in the clause referred to, simply says that the fugitive shall be surrendered up, but does not say by whom. The court, in *Kentucky v. Dennison*, did not emphasize this point but went on to declare that, under the Constitution, the Federal Government is not armed with the power to compel the State Executive to obey a mandamus, that is, that Congress could not have authorized the use of compulsion upon the State officials to make the surrender. The court said: "We think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State."<sup>27</sup>

It is submitted that the doctrine thus stated is a constitutionally proper one only if it be limited in its application to the imposition upon State officials of the performance of ordinary executive or administrative functions of the Federal Government, and be held not to apply to the doing of acts which are necessary to be done in order that rights which are recognized or secured by the Federal Constitution, as determined by the Federal courts, may be enjoyed by those entitled to them. And this, in substance, was the position assumed by the Supreme Court in *Ex parte Virginia*<sup>28</sup> when it declared that a State judge might be criminally proceeded against in a Federal court for refusing, while in the exercise of his jurisdiction as a State judge, to give to a party before him a right to which, under the Federal Constitution and an act of Congress in pursuance thereof, he was entitled. The court attempted to distinguish the *Ex parte Virginia* case from that of *Kentucky v. Dennison* by saying that, with reference to the interstate rendition of fugitives from justice, the Constitution had not expressly empowered Congress to legislate for the enforcement of the duty prescribed by the Constitution; whereas, in the instant case, which arose under the Fourteenth Amendment, Congress had been specifically empowered to enforce its provisions by appropriate legislation; and, furthermore, that the prohibitions of the Fourteenth Amendment were specifically addressed to the States. This attempted distinction would seem to be

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<sup>27</sup> The court added: "It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal."

<sup>28</sup> 100 U. S. 339.

without merit, for, in conformity with the general doctrine of implied powers, Congress does not need to be expressly empowered to enact laws for the enforcement of an obligation stated in unqualified and mandatory terms by the Federal Constitution.<sup>29</sup> It might, however, have been possible for the court to have held that, with reference to the rendition of fugitives from justice, it is the intention of the Constitution that their apprehension and surrender to the executives of the States from which they have fled, shall be by Federal officials authorized so to do by congressional statute; in other words, that the constitutional provision is not intended to create and, therefore, has not created, any obligation in the premises upon the part of the States or of their officials as such. But this was not the argument of the court. Instead, it viewed the constitutional obligation as one resting upon the States or on their officials, and then employed wholly unconvincing reasoning to show that this obligation was not a Federally enforceable one.

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<sup>29</sup> *Cf.* article by W. C. Coleman, referred to at the head of this chapter.

## CHAPTER LXXX

### IMPEACHMENT

#### § 927. Constitutional Provisions.

The constitutional provisions for impeachments are contained in the clauses quoted in the footnote.<sup>1</sup>

The term "impeachment" was a well known one at the time the Constitution was adopted, having been inherited from English usage. Recourse may, therefore, be had, when necessary, to that usage and practice for interpretative guidance.

#### § 928. Persons Subject to Impeachment.

It will be observed that the Constitution makes no mention as to what persons shall be subject to impeachment. According to English precedent all citizens are subject to impeachment, and it was at first asserted by some that the same is true in this country.<sup>2</sup> The limitation of impeachment to the President and Vice-President and to civil officers of the United States

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<sup>1</sup> Art. I, Sec. 2, Cl. 5. "The House of Representatives . . . shall have the sole power of impeachment."

Art. I, Sec. 3, Cl. 6. "The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present."

Art. I, Sec. 3, Cl. 7. "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

Art. II, Sec. 2, Cl. 1. "The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Art. II, Sec. 4. "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Art. III, Sec. 2, Cl. 3. "The trial of all crimes except in cases of impeachment, shall be by jury. . . ."

<sup>2</sup> *E. g.*, by Mr. Bayard upon the occasion of the impeachment of Senator Blount. 5 *Annals of Congress*, 2251. This doctrine was approved by Jefferson, but repudiated by Madison who wrote: "The universality of this power is the most extravagant novelty that has been broached." See article entitled "The Law of Impeachment in the United States," by David Y. Thomas in the *American Political Science Review*, May, 1908. The author is much indebted to this valuable article. Much information regarding impeachments, Federal and State, is given by Mr. Roger Foster in the first volume of his *Commentaries*.

would, however, seem to be implied in the provision that these persons shall be removed from office on impeachment, and that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold office under the United States, and it is now generally agreed that only civil officers may be impeached.

### § 929. Who Are Civil Officers.

Military officers are not subject to impeachment. No attempt has ever been made to impeach an officer of the army or of the navy, and, therefore, there have been no pronouncements upon this point. But there has been no question as to this doctrine.

Members of Congress are not officers of the United States, not being commissioned by the President. This point was made at the time of the impeachment proceedings of Senator Blount, a resolution to the effect that he was an officer being negated by a vote of fourteen to eleven.

### § 930. When a Civil Officer May Be Impeached.

By Story it was held that, to be impeachable, the accused must be at the time in office. He says: "If, then, there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of impeachment. If he was not his offence was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued, with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most important object for which the remedy was given was no longer necessary or attainable."<sup>3</sup> This view, however, has not been accepted, and Story's reasoning would not seem to be adequate to support it. For, in the first place, it is recognized by the Constitution that the object of impeachment may be not only the removal of the accused from office, but also his disqualification to hold office in the future. In the second place, as will presently appear, impeachment may be based upon other than criminal offences, and, therefore, the argument that the accused may be punished in the ordinary courts of justice has, in those cases, no validity.

When articles of impeachment were brought against Senator Blount his counsel urged, *inter alia*, that the Senate having already expelled him from that body, he was no longer subject to impeachment. It was not urged, however, that this non-amenability to impeachment would have followed from voluntary resignation. "I shall certainly never contend," declared Mr. Ingersoll, one of his counsel, "that an officer may first commit an offence and afterwards avoid punishment by resigning his office."<sup>4</sup> Inasmuch as the Senate held that a Senator was not, under any circumstance,

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<sup>3</sup> *Commentaries*, § 804.

<sup>4</sup> *Cf.* article by Prof. D. Y. Thomas in 2 *American Political Science Review*, 378.

subject to impeachment, it was not necessary to pass upon the plea based upon his prior expulsion. The impeachment finally failed, not upon the question of guilt, but upon the ground that the Senate was without jurisdiction for the reason that members of Congress are not civil "officers" of the United States.

In the case of the impeachment of Secretary of War Belknap, however, the issue was squarely raised whether a civil officer, in anticipation of impeachment, might by resignation escape from liability to trial by the Senate. By a vote of thirty-seven to twenty-nine, seven not voting, it was held that the jurisdiction of that body had not been ousted by the resignation, and by a later vote it was held that for this decision a two-thirds approving majority was not needed.<sup>5</sup> And it may be noted that, in general, it has been held that the constitutional requirement as to the majority needed for conviction applies only to the final votes upon the question of guilt.

### § 931. For What Offences Impeachment Will Lie.

The constitutional provision is that impeachment may be had for "treason, bribery, or other high crimes or misdemeanors."

The terms "treason" and "bribery" require no definition. Treason is, indeed, defined in the Constitution itself, and the offence of bribery is sufficiently definite and well known. To the term "high crimes and misdemeanors," practice has given a broad meaning that brings within its connotation offences not penal by Federal statute. Professor Thomas, in the article to which reference has been made, points out that in the first four impeachment trials not a single charge rested upon a statute, and the same was true of some at least of the articles in most of the other trials.

It would also seem to be established that the offence charged need not be one committed in the discharge of official duties.

In the report of the committee recommending to the House of Representatives the impeachment of District Judge English it was declared: "It is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, and also to those

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<sup>5</sup> The same ruling was made in the trial of Judge Archbold. It may be noted that Secretary Belknap was acquitted by virtue of the fact that twenty of the Senators so voting did so upon the ground that the Senate had, by Belknap's resignation, lost jurisdiction. In the following cases of Federal judges impeachment proceedings recommended by the House Committee were dropped upon notice that the judges involved had resigned: P. K. Lawrence, in 1839; J. C. Watrous, in 1860; M. H. Delahay, in 1872; E. Durell, in 1874; and R. Busteed, in 1874.



which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for 'a breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness, when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law.' No judge may be impeached for a wrong decision."

Speaking before the American Bar Association in 1913, Mr. W. H. Taft, now Chief Justice of the Supreme Court, said: "Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed is misconduct involving bad faith or wantonness or recklessness in his judicial action or in the use of his official influence for ulterior purposes. . . . By the liberal interpretation of the term 'high misdemeanor' which the Senate has given, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit."

In the most recent impeachment trial, that of District Judge English in 1926-1927, none of the charges upon which the impeachment was based was of an indictable character: they related to tyrannical and abusive use of his judicial power, to partiality and favoritism (especially to one Charles B. Thomas, his referee in bankruptcy, to whom Judge English was under heavy financial and other obligations), and, in general, to misbehavior in office.

In the case of Circuit Judge Archbold who was impeached and found guilty by the Senate in 1912 it was held that he could not be impeached upon the ground of acts done by him while District Judge.

### § 932. The Senate as a Court in Impeachment Proceedings.

The Senate, when trying impeachments, sits not as a legislative but as a judicial body.<sup>6</sup> This is important, since, sitting as a court, the Senate is under at least a moral obligation to follow, as near as may be, judicial modes of procedure. This, however, does not obligate it to abide by all the technical rules as to the admissibility of evidence and other technical rules which govern in the ordinary courts of law. Thus, in general, the Senate has accorded to the accused the constitutional rights that he could claim in ordinary criminal proceedings, such as the right to assistance of counsel, to be confronted with the witnesses against him, to have com-

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<sup>6</sup> Cf. "Federal Impeachments" by Alec. Simpson, Jr., in 64 *University of Pennsylvania Law Review*, 651, 667ff.

pulsory process for obtaining witnesses in his favor, exemption from being compelled to be a witness against himself, etc.

It is scarcely necessary to say that the proceedings and determinations of the Senate when sitting as court of impeachment are not subject to review in any other court.

The Chief Justice, when presiding in trial of the President, has the same right to vote as has the Vice-President in other cases.

### **§ 933. Effect of Dissolution of Congress.**

Whether or not the dissolution of the House preferring the impeachment operates to terminate the charges made has not been determined, the occasion for the determination not having arisen. Reason and analogy with ordinary criminal proceedings and with English practice would seem to answer the question in the negative.

### **§ 934. Punishment.**

It is constitutionally provided that conviction upon impeachment must result in removal from office. To this may be added disqualification to hold and enjoy in the future any office of honor, trust, or profit under the United States. Where a criminal offence has been committed the party convicted is still "liable and subject to indictment, trial, judgment and punishment according to law."

The power of the President to grant reprieves or to pardon does not extend to cases of impeachment.

## CHAPTER LXXXI

### THE ELECTION OF THE PRESIDENT AND VICE-PRESIDENT

#### § 935. The Executive Department.

The President and Vice-President are the only Federal executive officers for whose selection and functions the Constitution makes direct provision, unless, indeed, one includes the Senate to which is intrusted participation in the executive functions of appointments and approval of treaties. That certain great executive departments should be legislatively established was taken for granted, as shown, for example, in the provision that the President "may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices"; and that the appointment of inferior officers may be by Congress vested in the "Heads of Departments."<sup>1</sup> From time to time these great executive departments, as well as certain "commissions" and other executive bodies not falling within any one of the "departments," have been created. The description of the organization and functions of these bodies does not fall within the scope of a treatise on constitutional law. We shall be concerned, however, in later chapters with the manner in which all these executive agencies are integrated into one great system with the President at its head and with the extent of the directive power which the President may exercise over the civil and military service, and which the higher executive officials may exercise over their subordinates.

In the present chapter will be considered the qualifications for the Presidency and the Vice-Presidency, and the constitutional provisions governing the selection of persons to fill these offices.

#### § 936. Appointment of Presidential Electors; Plenary Powers of the States.

The Constitution provides that "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States shall be appointed as elector."<sup>2</sup>

It will be observed that the Constitution gives complete power to the

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<sup>1</sup> Art. II, Sec. 2, Cl. 1; Art. II, Sec. 2, Cl. 2.

<sup>2</sup> Art. II, Sec. 1.

States in the selection of presidential electors. The provision is that each State shall appoint, in such manner as the legislature thereof may direct. There is no requirement as to their election by the people. Representative Storrs once said, perhaps with some extravagance, that so plenary is the power thus given to the States in this respect, they may, if they see fit, vest the appointment of electors in "a board of bank directors, a turnpike corporation, or a synagogue."<sup>3</sup>

### § 937. Presidential Electors are State Officials.

In *Re Green*<sup>4</sup> it was held that a State may punish for illegal or fraudulent voting for presidential electors. In the course of its opinion the court said: "Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of Representatives in Congress."

This is undoubtedly true, but, in the opinion of the author of the present treatise these electors none the less, when electing the President or Vice-President or Senators or Representatives, are performing a distinctively Federal function, and, therefore, when so acting, and as to such acts, are subject to Federal supervision and control, though, of course, not to dictation as to whom they shall elect.

### § 938. Modes of Appointment.

The power of the legislatures of the States to appoint the presidential electors is given to them by the Federal Constitution. It would seem, therefore, that this power cannot be taken from them by any constitutional provisions of the States concerned.<sup>5</sup>

As a matter of fact during the early years under the Constitution in many of the States presidential electors were not elected at all, but appointed by the legislatures, and this practice did not wholly disappear until quite recently. South Carolina practiced legislative appointment until 1860, and Colorado appointed in this manner in 1876.<sup>6</sup> At the present time, in all the States, the electors are chosen by popular ballot on a

<sup>3</sup> Quoted by Dougherty, *The Electoral System of the United States*, p. 21.

<sup>4</sup> 134 U. S. 377.

<sup>5</sup> Query: Whether this power is vested in the State legislature alone so that it may be exercised by concurrent action upon the part of the two Houses thereof, or whether the action should be joint with the Governor's concurrence? It would seem reasonable to hold that, if the legislature itself appoints by direct action upon its own part, the Governor should play no part. However, if the legislature fixes, in advance, the mode in which the appointment of electors is to be made, a statute is required which will require the governor's approval, unless, of course, his veto is constitutionally overriden.

<sup>6</sup> Finley, *The American Executive*, 332.





**§ 941. Twelfth Amendment.**

The inadequacy of the original constitutional provisions for the election of the President and Vice-President early became manifest. John Adams became President in 1796 though he did not receive half the votes. In 1800 Jefferson and Burr received the same number of electoral votes, and each a majority. There was no question, however, that the electors desired that Jefferson should be President and Burr Vice-President; but, had it not been for the patriotism of Hamilton and a few other Federalists, Burr would have been selected President though he had not been the choice of probably a single elector for that office. This experience was sufficient to lead, in 1804, to the adoption of the Twelfth Amendment, in substitution for clause 3 of Section 1, of Article II.<sup>9</sup>

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then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

<sup>9</sup> Art. XII. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the Senate;—The president of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the vote shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

### § 942. Counting the Votes.

With reference to the action of the Houses of Congress, after the selection of electors has been certified to them, the Twelfth Amendment, copying the language of the original provision of the Constitution, declares that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes *shall then be counted.*"

The meaning of the last four words has been shrouded in doubt, and this doubt came very near to leading to serious consequences in 1876-1877. No declaration, it is to be observed, is made as to who shall do the counting, and, therefore, who shall determine what votes shall be counted in case there is question as to their regularity or correctness. In 1876 there were enough votes contested to determine the election. Upon the part of the Republicans it was claimed that the Vice-President (a Republican) should do the counting. The Democrats, however, asserted that the two Houses voting separately should perform this duty. As the Democrats were then in control of the lower House, and the Republicans in control of the Senate, this meant a deadlock. The *impasse* was finally broken by the very doubtful constitutional expedient of a special electoral commission to which all the then pending disputed cases should be submitted, the Congress being pledged to be guided by its decisions.

### § 943. Act of 1887.

By a law of February 3, 1887,<sup>10</sup> the whole matter of the election of the President is attempted to be regulated. By the first section of this act the second Monday in the January succeeding their appointment is fixed for the meeting of the electors and the giving of their votes. The postponement from the date formerly in force, namely, the first Wednesday in December, is to give the States full opportunity to determine any questions that may arise with reference to the appointment of their respective electors.

The second section of the act declares:

"If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for the final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determinations shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitu-

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<sup>10</sup> 24 Stat. at L. 373.







The final section (7) of the act provides that the joint meeting of the two Houses "shall not be dissolved until the count of electoral votes shall be completed, and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House, not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall have not been completed before

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shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

"§ 5. That while the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

"§ 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate."

the fifth calendar day next after such meeting of the two Houses, no further or other recess shall be taken by either House."

#### § 945. Criticism of the Act of 1887.

This act in many respects embodies prior legislative practice, and is certainly founded upon the same constitutional theory as to the extent of the powers of Congress with reference to the subject. The act as it stands is, however, open not only to serious constitutional objections, but to the criticism that it leaves unsettled a number of points which, in the future, may easily lead to serious dispute.

The germ of the act of 1887 is to be found in the bill of 1800 which was discussed in Congress but never enacted, the two Houses failing to agree upon certain of its provisions. With reference to the powers of counting therein given to Congress, C. C. Pinckney, of South Carolina, raised the point of unconstitutionality.

"There is not," Pinckney said, "a single word in the Constitution, which can, by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State Legislatures' directions. I well remember," he continued, "it was the object [of the Constitutional Convention] to give to Congress no interference in or control over the election of the President. . . . It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention the right to object to any votes, or even to question whether they were constitutionally or properly given."<sup>15</sup>

When the act of 1887 was under discussion, Senator Wilson of Iowa asked: "Can we conclude that the framers of our Constitution when they conferred on the respective Houses of Congress these extraordinary powers [as in certain contingencies to elect the President and Vice-President], intended to invest them with the still more extraordinary power of rejecting the votes of electors appointed by the several States, and thereby creating, by themselves and for themselves, the contingency which alone gives them the right and power to elect a President and Vice-President? The mere statement of such a proposition is its own refutation. And if no such power rests with the two Houses for concurrent action, how much more preposterous does it seem to be to claim that it rests with either House alone, and especially with the House of Representatives, with which body the power to elect a President abides in the event of the failure of the electors to elect."

The theory that the power of counting belongs to the two Houses in joint meeting has been stated as follows:<sup>16</sup>

"The exclusive jurisdiction of the two Houses to count the electoral votes by their own servants and under such instructions as they may deem proper

<sup>15</sup> Quoted by Dougherty, *The Electoral System of the United States*, p. 66.

<sup>16</sup> *The Presidential Counts*. Quoted by Dougherty, p. 61.





clude the vote of New York or any other State in the Union, not by the will of the two Houses, but by the veto of either House; ' and, as he forcibly added, 'If the Senate should reject the vote of a State and thus secure a party advantage, the House could reject the vote of another State to secure a like advantage.'

"In the third case, where there has been more than one return but no decision by a State tribunal upon the appointment of electors, the State may be disfranchised through the failure of the two Houses to agree. The language is:

" 'Those votes and those only shall be counted which the two Houses shall concurrently decide were cast by lawful electors, appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of the State. But if the two Houses shall disagree in respect to the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.'

"The two Houses may in this class of cases inquire whether the electors have been legally appointed and also whether their votes are lawful votes. If the two Houses disagree upon either proposition, the votes (the word 'lawful' is omitted before 'votes') of the electors who are fortified in their appointment by the certificate of the state executive are to be counted. In this one case of a double return, the difference of opinion between the two Houses will not lead to the rejection of the State's vote, if there is a certificate of the State executive as to the appointment of the electors. In the fourth case, the same broad powers are conferred upon the two Houses. Where there is more than one return from a State, in which there has been no determination of the question who are its electors, and neither of the rival sets of electors is furnished with the certificate of the executive, the two Houses may determine who are the lawful electors of the State, and the votes of such electors shall be counted, unless the two Houses by concurrent resolution decide that such electors have not given their votes regularly or lawfully." <sup>19</sup>

Among other questions left unsettled by the act are the following:

In case a constitutionally ineligible elector is voted for and elected, is he simply to be disregarded, and thus the State deprived of one of its electoral votes; or is the person receiving the next highest popular vote to be held elected?

The act does not provide how and under what circumstances the certificate of a governor may be impeached: Nor does it decide what shall be done if electors are by act of God prevented from voting on the date fixed, as happened in Wisconsin in 1856.

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<sup>19</sup> *Op. cit.* 237ff.

No provision is made for a chief executive in case neither President nor Vice-President is chosen by March fourth. It has been suggested, however, that in case such an eventuality is foreseen the then President and Vice-President may resign, in which case, by the law of 1886, the Secretary of State would act as President until an election is had.<sup>20</sup>

No provision is made as to what shall be done in case the person for whom the electors are expected to vote dies before the electors meet.<sup>21</sup>

No provision is made as to who shall serve as Chief Executive of the United States in case both the President-elect and the Vice-President-elect die after the electoral colleges have adjourned, and before March fourth.

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<sup>20</sup> See Woodburn, *The American Republic*, p. 119.

<sup>21</sup> This is of course merely a political question, and cannot be remedied by law so long as, in constitutional theory, the electors vote for whomever they see fit.







"until the time of electing a President shall arrive." Madison objected to this that it would prevent an intermediate election, and thereupon the present phraseology was adopted.

This would seem to indicate that it was intended that Congress should have the power of ordering an intermediate election. But this is not conclusively established; for the convention struck out from the Constitution the proposal that the United States should have the power to emit bills of credit, and to make them legal tender, as well as the power to grant charters of incorporation, yet the authority to do these acts has been found elsewhere in the Constitution by the courts. So in the present case, the mere removal of an obstacle to the holding of an intermediate election, by striking out the provision that the acting President shall act "until the time of electing a President shall arrive," cannot be held in itself to confer the power in question upon Congress.

#### § 948. Act of 1886.

In 1886 (January 19) was enacted the following law:

*"Be it enacted, etc. . . .* That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be none, or in the case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided*, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

"Sec. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of the President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of office shall devolve upon them respectively."

By this measure, it will be seen that the Speaker of the House and the President *pro tem.* of the Senate no longer figure in the succession, and. fur-

thermore, that there is no longer, as there was in the act of 1792, a provision that an intermediate presidential election shall be held. There is a provision, however, that if Congress be not in session at the time of the happening of the vacancy, or if in regular course it would not assemble within twenty days, then an extraordinary session shall be called.

As originally introduced by Senator Hoar, the bill had provided especially that the acting President should hold office for the balance of the unexpired term, but this provision was struck out. It is, therefore, apparent that, by this action, or by providing that a Congress shall be assembled, the intention of those who voted for the measure of 1886 was that Congress, if it should so see fit, may order an intermediate election. The act thus leaves it to the determination of each Congress, as the occasion may arise, whether or not such an election shall be held, or the acting President permitted to hold office for the unexpired portion of the presidential term.<sup>5</sup>

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<sup>5</sup> Politically this would seem to be a most unwise provision. As to this the author would agree with the judgment of Mr. Hamlin who writes:

"The acting President, under the law, must call Congress together, and that body will then decide whether it deems a special election desirable and incidentally constitutional. If it decides in the affirmative, it will frame an act which may speedily oust the acting President from office. Such an act the acting President can veto, and if vetoed, the usual two-thirds vote will be necessary to overcome the veto. Even a death-blow might be administered by a pocket veto.

"It is not disputed that consequences disturbing to business and injurious to the prosperity of the country might follow under the Act of 1792. I fear, however, that under the Act of 1886 disturbance to business and injury to the prosperity of the country are to be feared almost as acutely, if of different kind. Let us suppose, for example, that a Republican President holds office but that the Republican party is in a minority both in the House and Senate. Such a condition existed under President Hayes in the 45th and 46th Congresses, and, the parties reversed, under President Cleveland in the 54th Congress. Let us further suppose that the Democratic majority wishes to reduce the custom duties; that the Republican President dies; that there is no Vice-President; that the Secretary of State succeeds as acting President, that the Democrats in Congress, believing that the people desire radical reduction of taxation, yet know that the acting President will veto a tariff reduction bill; and that they are confident that a Democratic President can be elected on this issue. Can any one doubt the inadvisability of permitting an acting President to decide whether or not there shall be such a special election? If the acting President were to veto such a bill, it is to be feared that the majority in Congress might tie up the whole machinery of the government.

"Let us take another case. Suppose that a Republican President is in office, but that the Republican party is in a minority in one house and has a very slender majority in the other. This condition happened in 1881 under President Garfield. Let us further suppose that the President and Vice-President die; that the Secretary of the State succeeds to the Presidency and that he is bitterly opposed by many members of his party. Is it going too far to predict that the Democratic party might introduce a bill for a special election, knowing its ability to pass it in one house and relying upon assistance from enough members of the Republican party to carry it through the other? Is it not conceivable that the acting President might use all the patronage he controls to prevent the passage of such a bill? Is it not also possible that Congressmen (of course none in the present Congress) might couple requests for appointments of constituents with a

**§ 949. Presidential Inability.**

A criticism that may be made both to the constitutional provision and to the acts of 1792 and 1886 is that the term "inability" to discharge the powers and duties of the presidential office is not defined. In the absence of a definition, who is to determine, and what conditions are to be held to create an inability on the part of the President to perform his official duties? What is to be done in case the President is temporarily disabled by sickness or accident, or insanity? Who is to decide, and by what criteria when this disablement is so serious and so prolonged as to require the appointment of an acting President? For the two months preceding the death of President Garfield the country had no President able to perform the duties of the Chief Executive, and the same was substantially true during the long period of President Wilson's sickness prior to March 4, 1921.

The Constitution furnishes no direct answer to these questions. To the author it would seem that, under ordinary circumstances, the President himself may be trusted to recognize his own inability when it exists, and that, when he does declare this to be a fact, the Vice-President will therefore be justified in acting as President. If, however, it should happen that a President, though obviously unable to exercise the duties of his office, should refuse to recognize and declare this, or should be mentally unable to appreciate and declare his own inability, then the Vice-President should feel himself obligated to assume the office. It is to be assumed, however, that he would not take this serious step without previous consultation with, and approval by, the members of the President's cabinet and members of Congress. Having taken this step, its constitutionality could be tested in the courts by bringing before them the validity of his official acts, or of the acts of lower executive officials committed in reliance upon his orders. Thus, in last resort, the Supreme Court of the United States might be called upon to determine whether, in fact, there had existed an inability of the President which would constitutionally justify the exercise of presidential powers by the Vice-President. Similarly, should it happen that the disability of the President should prove to be temporary, and he should again claim the right to exercise the powers of his office, and the acting President should refuse, upon any ground, to yield to this claim, the question as to

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gentle intimation that, if made, the acting President need not worry, as to the fate of any bill providing for special election.

"It is hardly possible to overestimate the disturbance to the business interests of the country which might arise under such circumstances. The office of President would be held at the will of the legislative body. The power of the executive would be merged in that of Congress. Such a condition would be in hopeless conflict with the principles of the Constitution." *Harvard Law Review*, XVIII, 191, "The Presidential Succession Act of 1886."

For an excellent article dealing with the status of the Vice-President, and his relation to the Presidency, see the article "the Vice-Presidency of the United States," by Prof. Oliver P. Field in 56 *Am. Law Review*, 365.

who is to be recognized as legally entitled to exercise the powers of the President could be determined by the courts in cases involving the validity of the acts of either or both of the two claimants to the office.

**§ 950. Does a Succeeding Vice-President Become President, or Is He Merely Entitled to Act as Such?**

One further point regarding the succession of the Vice-Presidency needs to be mentioned. The language of the Constitution, strictly followed, would seem to point to, or at least render possible, the construction that upon the death, removal, resignation, or inability of the President, the Vice-President does not *become* the President, but simply that the powers and duties of the office "devolve" upon him. In Section 3 of Article I the Senate is authorized to choose a President *pro tempore* in the absence of the Vice-President "or when he shall exercise the office of the President of the United States," not when he shall become the President. This being so, in cases of disability of the President the Vice-President may by Congress be empowered not to *be* President, but to *act as* the President.

The uniform practice has been, however, since the time when Tyler took the oath of office on the death of Harrison, to consider the succeeding Vice-President as becoming the President. Under this practice, however, it may be asked, what, in case of disability, does the late President become, and how, upon removal of his disability, would he again become President? Does the Vice-President cease, for the time being, to be Vice-President, or does he hold both offices?

**§ 951. Third Term.**

The Constitution provides that the President and Vice-President shall hold office for the term of four years. The proper length of term, and the propriety of forbidding reelection, were discussed in the Convention and the four-year period with eligibility to reelection finally agreed upon. Nothing is said in the Constitution as to the number of times the same person may be reelected President, but, as is well known, the propriety of restricting the number of successive terms has become firmly rooted in the American mind.

With reference to this third term tradition one observation may perhaps be made. This is, that the doctrine is generally considered to have been first stated by Washington in his "Farewell Address." It would appear, however, as the historian McMaster has pointed out,<sup>6</sup> that Washington did not there attempt to lay down a principle, but simply to explain that he did not feel that the then condition of the country required him to serve a third term. He said: "The acceptance and continuance hitherto

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<sup>6</sup> In the chapter entitled "The Third Term Tradition" in the volume entitled *With the Fathers*.

in office, to which your suffrages have twice called me, have been a uniform sacrifice of inclination to duty, and to a deference to what appeared to be your wishes. . . . I rejoice that the state of your concerns, external as well as internal, no longer renders the pursuit of this inclination incompatible with the pursuit of duty or propriety." Jefferson was the first to decline a third term upon principle. Having been invited by a number of the States to stand for a third term he wrote (December 10, 1807): "That I should lay down my charge at a proper period is as much a duty as to have borne it faithfully. If some termination to the services of the Chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life; and history shows how easily that degenerates into an inheritance. Believing that a representative government responsible at short periods of election is that which produces the greatest sum of happiness to mankind, I feel it a duty to do no act which shall substantially impair that principle; and I should unwillingly be the first person who, disregarding the sound precedent set by an illustrious predecessor, should furnish the first example of prolongation beyond the second term of office."

From this time the propriety of principle was generally recognized. McMaster does indeed think that Jackson's popularity was great enough to have secured him a third term had he been willing to break the rule. As is well known strenuous but futile efforts were made to secure a third nomination for President Grant.

How strong the sentiment might be to giving three or more terms to the same person, so long as not more than two are successive, has never been tested. President Roosevelt upon his election in 1905 declared that, in accordance with the spirit, if not the literal requirements, of the tradition against a third term, he would consider the three years which he served as the successor of President McKinley as a first term for himself, and that he would not, therefore, be a candidate for renomination in 1908.

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## CHAPTER LXXXIII

### THE POWERS AND DUTIES OF THE PRESIDENT

#### § 952. The Oath of Office.

Before entering upon the execution of his office, the President is constitutionally required to take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

The making of this oath or affirmation marks the induction into office. The requirement that it shall be taken is undoubtedly dictated by the belief that thus an additional moral obligation will be placed upon the one taking it. That it adds no new legal obligation would follow from the fact that, beyond doubt, were this oath or affirmation not required, the President like all other public officers would be equally liable for any misfeasance or non-feasance of duty. It would seem equally true that the taking of this oath or affirmation, in pursuance of a constitutional requirement, confers no powers upon the President. Jefferson and Jackson, indeed, referred to this oath as supporting them in their contention that with reference to the performance of their constitutional duties they, as being sworn to support the Constitution, might interpret finally for themselves the meaning of its provision; but their position was unquestionably an incorrect one.

#### § 953. Constitutional Powers of the President as Chief Executive.

By Section 1 of Article II, it is declared that "The executive power shall be vested" in the President. By Section 3 it is required that "he shall take care that the laws are faithfully executed." In ultimate resort, then, all Federal executive authority is in the President, and upon him lies the responsibility for seeing that the laws of the United States are faithfully executed, that is to say, that the armed and other forces of the Nation are, if necessary, employed to maintain in efficient operation the government of the United States over such districts as are under its sovereignty, and everywhere and under all circumstances, to protect its officers in the performance of their duties.

In fulfilment of the responsibility thus constitutionally imposed, the President has, by necessary implication, the authority to use all the specific powers conferred by the Constitution upon him. Chief of these is, of course, his authority as commander-in-chief of the land and naval forces of the Nation. He has also authority in many directions given



him by statutes of Congress, with reference, for example, to the use of the militia, and to giving orders to subordinate executive officials.

Aside from these express powers, and those necessarily implied in them, the President has no authority to act.

Mr. Taft, in his volume *Our Chief Magistrate and His Powers*,<sup>1</sup> with regard to the general powers of the President, says: "The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an Act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest." However, as will appear in the chapter dealing with the constitutional power of the President to remove Federal officers from office, the court, in *Myers v. United States*<sup>2</sup> deduced this power not only from the President's power to appoint but also from the fact that, the power to remove being essentially executive in character, is to be regarded as included with the general and unqualified grant to him by the Constitution of the executive power. There can be no question but this holding marks a new departure in the construction of this provision of the Constitution, and that it opens up at least the possibility of declaring that other and still more important specific executive powers are vested in the President.

#### § 954. The President's Obligation to Take Care that the Law Be Faithfully Executed.

The Constitution declares<sup>3</sup> that the President "shall take care that the laws be faithfully executed." This provision, generally speaking, may be said to impose an obligation rather than to confer specific powers.<sup>4</sup> This obligation is one which is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer. At the time of the threatened resistance of the peoples of the Southern States to Federal law in 1860, President Buchanan, under the advice of his Attorney General, held himself practically powerless because of the lack of statutory authority to take the necessary steps. President Lincoln, upon his assuming office, gave a broader interpretation to existing laws conferring authority upon him, and Congress soon by statute further increased his powers.

In earlier chapters has been shown how, by successive decisions of the

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<sup>1</sup> P. 139.

<sup>2</sup> 272 U. S. 52. See Section 996.

<sup>3</sup> Article II, Section 3.

<sup>4</sup> In *Myers v. U. S.* (272 U. S. 52), however, there is a resort to this provision in part support of the doctrine that the President must have, and was intended to have, the power to remove officials. See Section 996.

Supreme Court, and by successive acts of Congress, the Federal courts and the Federal executive authorities have been empowered to extend full protection to all Federal officials in the performance of their official duties, whether with reference to the punishment of those who have interfered with them, or the transference into Federal courts, by habeas corpus, writs of error, or removal, cases in which Federal officials accused of crime before State tribunals have set up, as a defence, that the act or acts with the commission of which they are charged were performed in connection with the exercise of, and justified by their authority as Federal officers.

### § 955. The Neagle Case.

In these ways Congress has by law provided means by which resistance to Federal authority may be overcome or punished, and Federal agents protected in the performance of their Federal duties. In the case of *In re Neagle*,<sup>5</sup> however, the Supreme Court was led to take a position which, in a measure at least, departs from the principle which has been stated above, and recognizes in the President, acting through his Attorney General, an authority to furnish a protection for which neither the Constitution nor act of Congress has made express provision. The court does in fact appeal to the obligation to take care that the laws are faithfully executed as a source of affirmative power.

In this case, decided in 1890, was involved not only a question of conflict between State and Federal jurisdictions, but one as to the authority of the President of the United States, in default of statutory authorization, to depute to a United States marshal the specific duty of protecting a Federal judge in the performance of his official duties. In this case Neagle had, under instructions from the Attorney General of the United States, been deputized to guard Justice Field of the Supreme Court, while on circuit. In a railroad station in California Field was attacked by one Terry, whereupon Neagle shot and killed Terry. Upon being indicted on charge of murder in the courts of the State of California, Neagle set up the fact that he acted in the discharge of duties imposed upon him as a Federal official, and applied to a Federal court for discharge upon habeas corpus. That court ordered his discharge and this judgment was approved by the Supreme Court of the United States.

After stating in its opinion that Justice Field was at the time of the killing of Terry engaged in the discharge of his official duties, and therefore entitled to all the protection which the law could give him, the Supreme Court continued:

"It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or

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<sup>5</sup> 135 U. S. 1.

malicious assault growing out of the faithful discharge of his official duties, and that the language of Section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is 'in custody for an act done or omitted in pursuance of a law of the United States,' makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an Act of Congress. It is not supposed that any special Act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits and act as a body-guard to them to defend them against malicious assaults against their persons. But we are of opinion that this view of the Statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody 'for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or of a treaty of the United States.'

"In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably."

After observing that "if a person in the situation of Judge Field could have no other guarantee of his personal safety while engaged in the conscientious discharge of a disagreeable duty, than the fact that, if he was murdered, his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient," and after showing upon the authority of *Ex parte Siebold* <sup>6</sup> and *Tennessee v. Davis* <sup>7</sup> that the Federal Government has full constitutional authority to protect its agents within the States, the court asked by what department of the Federal Government, and by what means this protection was to be

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<sup>6</sup> 100 U. S. 371.

<sup>7</sup> 100 U. S. 257.

extended under circumstances such as those in the case at bar. After observing that the courts cannot do this, and that the power of the legislative branch is limited simply to the enactment of laws, and not to their enforcement, the opinion continued:

"If we turn to the Executive Department of the government, we find a very different condition of affairs. The Constitution, section 3, article 2, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, who are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

"Is this duty limited to the enforcement of Acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"

"We cannot doubt," the opinion concluded, "the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection."

From this case it would appear that, under his general duty to take care that the laws of the United States be faithfully executed, the President has, aside from any special constitutional or congressional endowment, an authority to empower action to be taken, when circumstances seem imperatively to demand, for the due enforcement of the law or the due protection of Federal rights, privileges or immunities. The only respect in which the court's ruling can be said to have been of doubtful propriety was in justifying the release of Neagle from the authority of the courts of the State of California, whose laws he was alleged to have violated, upon the ground that he was in custody for an act done or omitted in pursuance of a "law" of the United States, as provided for in Section 753 of the Re-

vised Statutes, and the implied holding that the President, by his order or command, could create such a law.<sup>8</sup>

Though not commonly referred to, the fact is to be noted with regard to this case that, later on in its opinion, the court did find a specific law which justified Neagle, as Federal marshal, in guarding Justice Field. Thus the court pointed out that Section 788 of the Revised Statutes provides that: "The marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." And, that a sheriff in the State of California had the authority to do what Neagle had done, the court found in Section 4176 of the Political Code of the State which provided that he should preserve the peace and "prevent and suppress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge."

### § 956. Protection of the President.

Closely connected with the matter discussed in the preceding section is the question as to the constitutionality of various measures, which have been proposed for enactment by Congress, for defining as a Federal crime the assaulting or killing of the President of the United States.

It is clear that such an act cannot be deemed treason, for it does not consist in levying war against the United States or adhering to their enemies, giving them aid and comfort.<sup>9</sup>

That Congress has the constitutional power to provide for the punishment of assaults upon officers of the United States, committed upon them while engaged in the performance of their official duties, or committed upon them because of their official character or because of some official act done by them, or to prevent some official act from being done by them,

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<sup>8</sup> See dissenting opinion of Justice Lamar, concurred in by Chief Justice Fuller. The majority opinion had referred as a precedent to the case of *Martin Koszta* in which an alien who had declared his intention of becoming a citizen of the United States, but had not been fully naturalized, was, upon the demand of the commander of an American ship of war surrendered by the Austrian authorities, by whom he had been seized, into the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. In this case the demand of the American commander had been predicated upon no express authorizing statute. As to this case not being in point, the dissenting opinion said: "Such action of the Government was justified because it pertained to the foreign relations of the United States in respect to which the Federal Government is the exclusive representative and embodiment of the entire sovereignty of the Nation, in its united character; for to foreign nations, and in our intercourse with them, States and State governments, and even the internal adjustment of Federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the Nation as a unit."

<sup>9</sup> Art. III, Sec. 3, of the Constitution.

there can be no reasonable doubt.<sup>10</sup> An act of Congress thus qualified with reference to assaults upon the President would, therefore, unquestionably be valid. Constitutional doubt arises only as to an act which would make it a Federal offence to assault the President as an individual and while not engaged in the performance of his official duties. Such assaults, it is clear, would be governed by the laws of the States in which they are committed, but it is difficult to see how they could be brought within the Federal criminal jurisdiction. The same consideration governs the offences of instigating, advising or counselling attacks upon or the killing of the President.<sup>11</sup>

By act of February 14, 1917,<sup>12</sup> Congress provided for the punishment of "any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any threat against the President." The constitutionality of this statute, so far as it relates to the mails, can probably be upheld under the postal power of Congress and the doctrine in *Ex parte Jackson*.<sup>13</sup> The constitutionality of the last clause, however, namely, "who knowingly and willfully otherwise makes any threat against the President," would seem to be highly doubtful.

### § 957. The President as Administrative Chief.

The functions of a chief executive of a sovereign State are, generally speaking, of two kinds—political and administrative. In different countries, with different governmental forms, the emphasis laid respectively upon each of these functions varies. In some, the powers and influence of the executive head are almost wholly political. In others, as for example in Switzerland, the political duties of the executive are so fully under legislative control that its chief importance is upon the administrative side.

### § 958. Originally Intended that the President Should Be Primarily a Political Chief: Congressional Control of Administration.

In the United States it was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose functions should, in the main, consist in the performance of those political

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<sup>10</sup> See, for example, *United States v. Cruikshank* (92 U. S. 542); as well as *In re Neagle* (135 U. S. 1).

<sup>11</sup> As to whether such advising or instigating could be brought under the crime of seditious libel, see *ante*, § 730. See also article "The Jurisdiction of the United States over Seditious Libel," by H. W. Bickl , in 41 *American Law Register* (N. S.) 1.

<sup>12</sup> 39 Stat. at L. 919.

<sup>13</sup> 96 U. S. 727.

duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate Federal administrative agents. The acts of Congress establishing the Departments of Foreign Affairs [State] and of War, did indeed recognize in the President a general power of control, but the first of these departments, it is to be observed, is concerned chiefly with political matters, and the second has to deal with the armed forces which by the Constitution are expressly placed under the control of President as Commander-in-Chief. The act establishing the Treasury Department simply provided that the Secretary should perform those duties which he should be directed to perform, and the language of the act, as well as the debates in Congress at the time of its enactment, show that it was intended that this direction should come from Congress. Furthermore, the Secretary was to make his annual reports not to the President, but to Congress.<sup>14</sup> In similar manner, the Post-Office Department, when first permanently organized in 1794, was not placed under the control of the President. The act gives in detail the duties of the Postmaster-General and there is no suggestion that in the exercise of these duties he is to be under other than congressional direction.

The constitutional power of Congress thus to assume direction of administrative departments of the government received the approval of the Supreme Court in *Kendall v. United States*.<sup>15</sup> In that case the court said:

"The executive power is vested in a President, and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character."

The Circuit Court in this case had said: <sup>16</sup> "The legislative may prescribe

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<sup>14</sup> Cf. Goodnow, *American Administrative Law*, p. 78.

<sup>15</sup> 12 Pet. 524.

<sup>16</sup> *United States v. Kendall* (5 Cr. C. C. 163).

the duties of the office at the time of its creation, or from time to time as circumstances may require. . . . As the head of an executive department, he [the Postmaster-General] is bound, when required by the President, to give his opinion in writing upon any subject relating to the duties of his office. The President in the execution of his duty to see that the laws be faithfully executed, is bound to see that the Postmaster-General discharges 'faithfully' the duties assigned to him by law, but this does not authorize the President to direct him how he shall discharge them."

### § 959. Development of the Administrative Powers of the President.

Despite this obvious original intention to confine the duties of the President mainly to the political field, the President has in practice become the head of the Federal administrative system.<sup>17</sup> This has been due to two causes. In the first place the President's power of removal from office, a power which he may exercise at will, has easily enabled him to obtain administrative action even when he has not had legal power directly to command it. This was clearly shown in the episode of the removal of the bank deposits by Jackson. In the second place, the practical necessities of efficient government have compelled Congress to place in the President's hand powers of administrative discretion, and have inclined the courts to uphold his orders whenever it has been possible to do so.<sup>18</sup>

Even where the President has not the power to command, he has the constitutional right to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."<sup>19</sup>

Acting under his constitutional obligation to take care that the laws be faithfully executed, the President may take such steps as are necessary and the laws permit, to compel the proper performance of their respective duties by Federal agents generally. This duty does not, however, make the President responsible for every act committed by a subordinate administrative official, nor, even where a duty is expressly laid upon him by the Constitution or by statute, is it necessary, or humanly possible, for him, in every case, to perform the duty in person.<sup>20</sup>

<sup>17</sup> Not only this, but he has become the chief of his political party. For an account of the forces and manner by and in which this has been brought about, see Macy, *Party Organization and Machinery in the United States*; and Ford, *Rise and Growth of American Politics*.

<sup>18</sup> See paper by Prof. James T. Young, "The Relation of the Executive to the Legislative Power" in *Proceedings of the American Political Science Association*, I, 47.

<sup>19</sup> U. S. Const., Art. II, Sec. 2, Cl. 1.

<sup>20</sup> In *Williams v. United States* (1 How. 290), the court said:

"The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and



### § 960. President Acts through the Heads of Departments.

In general the courts have recognized that the President acts through the heads of Departments and that their acts are, in the view of the law, his acts. In proper cases, also, the acts of subordinate officials will be considered as the acts of a departmental head, and thus of the President.

By a law of 1806 the President was authorized to exempt certain lands from sale. In *Wilcox v. Jackson*<sup>21</sup> the court said with reference to a certain tract: "Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was, in legal contemplation, the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress."<sup>22</sup>

### § 961. Except when His Personal Judgment Is Demanded.

Where, however, from the nature of the case, or by express constitutional or statutory declaration, it is evident that the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else. Thus in *Runkle v. United States*<sup>23</sup> it is said: "As the sentence under consideration involved the dismissal of Runkle from the army, it could not become operative until

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expected to perform. This cannot be, because if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the Government in the personal action of the one chief executive officer. It cannot be, for the strongest reason, that it is impracticable—nay, impossible."

<sup>21</sup> 13 Pet. 498.

<sup>22</sup> In *Jones v. United States* (137 U. S. 202) the court said: "The power conferred on the President of the United States by section 1 of the Act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. *Wolsey v. Chapman* (101 U. S. 755); *Runkle v. United States* (122 U. S. 543)."

In *United States v. Eliason* (16 Pet. 291) the court said:

"The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."

<sup>23</sup> 122 U. S. 543.

approved by the President, after the whole proceedings had been laid before him. The important question is, therefore, whether that approval has been positively shown. There can be no doubt that the President, in the exercise of his executive powers under the Constitution, may act through the head of the appropriate executive department. The heads of the department are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by the court. Here, however, the action required of the President is judicial in its character, not administrative. As commander-in-chief of the army, he has been made by law the person whose duty it is to review the proceedings of the courts martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required—as much so as if it would have been in passing upon the case, if he had been one of the members of the court martial itself. He may call others to his assistance in making his examination, and in informing himself what ought to be done, but his judgment when pronounced must be his own judgment and not that of another.”

In *Ex parte Field* <sup>23a</sup> it was held that, granting that the President has the power to suspend the issuance of the writ of habeas corpus, this suspension could not be ordered by the Secretary of War, though declared to be by direction of the President. The court declared that the exercise of such an important act required the President's personal and direct action based upon his own judgment as to whether his discretionary power should be exercised.

### § 962. Administrative Appeals.

The courts have laid down the general doctrine that where a power of supervision and direction is given to an administrative superior, this power may be exercised either by way of direct order, or by entertaining appeals from the acts of subordinates.

In *Knight v. United States Land Association* <sup>24</sup> the court, construing a law requiring that certain things be done under the direction of the Secretary of the Interior, quoted with approval the following from an opinion of the Secretary:

“The statutes in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision

<sup>23a</sup> Fed. Cas. No. 4761.

<sup>24</sup> 142 U. S. 161.

may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

This case was quoted and approved in *Orchard v. Alexander*.<sup>25</sup> In that case the court said: "Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius v. Kessel* (128 U. S. 456), not arbitrary and unlimited. It does not prevent judicial inquiry. (*Johnson v. Towsley*, 13 Wall. 72.) However, the court went on to observe, it is competent for Congress to give finality to the determinations of subordinate administrative officers, provided due process of law, that is notice and a hearing, is provided. In *Butterworth v. United States* (112 U. S. 50) it was held that the Secretary of the Interior had, under the statutes, no power to revise the action of the Commissioner of Patents in awarding to an applicant priority of invention and adjudging him a patent. But this was on the ground that the law expressly provided for an appeal from the Commissioner to the Supreme Court of the District of Columbia, whose decision should 'govern the further proceedings in the case.'"

Generally speaking, it has been held that no appeal lies to the President from the heads of the great Departments at Washington. This is upon the ground that the acts of these administrative chiefs are held to be the acts of the President.<sup>26</sup> It may be observed, however, that in the several States of the Union the heads of the administrative departments have, commonly, no powers of direction, and, therefore, that there is no general right of appeal to them.

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<sup>25</sup> 157 U. S. 372.

<sup>26</sup> *Opinions of Atty. Gen.* IX, 462; X, 526.

**§ 963. Administrative Decentralization in the States.**

In general it may be said that the administrative systems of the States are much less centralized than that of the United States. As contrasted with the Federal system the governors have, in general, no general powers of removal of public agents from office, nor are they given supervisory and directory power over the various administrative departments and boards of the State governments. Furthermore, in most of the States each of these several departments and boards is not only not integrated into a single system under a single head, but individually exhibits slight administrative integration. It should, however, be observed that recent years have witnessed in a number of the States a strong tendency to centralize and integrate their administrative systems.

**§ 964. Increasing Integration of Federal Administration.**

The Federal administrative system has exhibited a steady increase in integration. In the earlier years subordinate administrative officials were accustomed to act in individual cases without feeling themselves bound to consult the judgment of those higher in office, nor did they hold themselves necessarily bound by directions from such source. The principle followed by them was that they, as well as those in higher position, derived their authority by direct grant from Congress and were subject to control and direction only by that body or by the courts. The necessities of efficient government have, however, compelled Congress to place express powers of control over their subordinates in the hands of administrative chiefs, and have persuaded the courts to recognize, whenever possible, the existence of these supervisory powers even where express statutory provision has not been made for their exercise. Professor Goodnow, commenting on this development, says: "At the present time the collectors of the customs would hardly think of attempting to apply a law in a doubtful case without first receiving instructions from the Secretary of the Treasury (Rev. St., § 2652) and the law makes an appeal from the collector of internal revenue to the Treasury Department necessary before the aggrieved party has any standing in court (Rev. St., § 3226). This was the case also in the customs administration until the passage of the customs administrative law of 1890 which took away the administrative remedy of appeal to the Secretary of the Treasury and provided an appeal to the general appraisers. The same thing is true in many cases in the Department of the Interior (Rev. St., § 2273). Finally it has been held that the head of a department may change the erroneous decision of a subordinate (*U. S. v. Cobb*, 11 Fed. Rep. 76) and that any person aggrieved by the refusal of a subordinate to obey the order of the head of a department may obtain from the proper court a mandamus to force the subordinate to obey such order. *Miller v. Black*, 128 U. S. 50." <sup>27</sup>

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<sup>27</sup> *American Administrative Law*, p. 142.

**§ 965. Administrative Interpretations.**

In the interpretation of the law one administrative officer is not bound by that given to it by his predecessors. He will not, however, disturb the application of the law that has been made in a given case. That determination he will not reverse or alter.<sup>28</sup> In an opinion upon this point the Attorney General has observed that if a decision in a case made years before under a former executive were open to review and revision, the same principle would open decisions made during the Presidency of Washington, and the acts of the Executive would be kept perpetually unsettled and afloat.

In subsequent cases of a similar nature, however, a different rule may be applied, though it would seem that this rule thus newly laid down could not be made to govern cases where action has already been taken by individuals relying upon the rule formerly recognized.

**§ 966. Administrative Regulations.**

The authority on the part of an administrative officer to issue a regulation carries with it, as the court said in *United States v. Eliason*,<sup>29</sup> "the power to modify or repeal, or to create anew." This power to amend or repeal an order already issued and in force may not, however, be so exercised as to violate a vested right of an individual;<sup>30</sup> nor may a newly adopted administrative rule be made retroactive so as to impair private rights.<sup>31</sup>

It would appear, however, especially from the case of *Dunlap v. United States*<sup>32</sup> that the right of an individual to a privilege created by law may sometimes be defeated by the failure of the proper administrative office to make regulations determining the manner in which, and circumstances under which, the right in question may be enjoyed. It is possible, however, that this is true only in those cases in which it would appear that the legislature has vested the executive with discretionary power to determine when the circumstances are appropriate for granting the right in question. In the case referred to the court held that under an act of Congress which granted a rebate or repayment of tax on alcohol used in the fine arts by a manufacturer under regulations to be prescribed by the Secretary of the Treasury, no claim for such rebate could be made because the Secretary had not made any regulations for such use. The court in its opinion said: "It seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as an essential prerequisite, and may reasonably be held to have left it to the Secretary to de-

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<sup>28</sup> *Opinions of the Atty. Gen.*, II, 8.

<sup>29</sup> 16 Pet. 291.

<sup>30</sup> *Campbell v. United States* (107 U. S. 407).

<sup>31</sup> *United States v. McDaniel* (7 Pet. 1). Cf. Goodnow, *American Administrative Law*, 145.

<sup>32</sup> 173 U. S. 65.

termine whether or not such regulations could be framed, and, if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so."

**§ 967. Power of the President to Control the Institution and Prosecution of Suits by the Department of Justice.**

The power of the President to control the institution and continuance of suits by the Attorney General and his assistants may seem to some an improper one, but its existence has been recognized since the foundation of the government. In 1827 the Attorney General declared that he "entertained no doubt of the constitutional power of the President to order the discontinuance of a suit . . . for it is one of the highest duties to take care that the laws be faithfully executed, and consequently that they may not be abused by any officer under his authority or control, to the grievance of any citizen." In 1831 Taney, then Attorney General, declared: "If it should be said that the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it, I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could act only through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continue a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President."<sup>33</sup>

In *United States v. San Jacinto Tin Co.*<sup>34</sup> and *United States v. Bell Telephone Co.*<sup>35</sup> was upheld a general power of the Attorney General and of his assistants, acting not in pursuance of any express statutory authority, but under their general powers as officers for the enforcement of the legal rights of the United States, to institute suits. In the first case the court said: "If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts for relief . . . the question of the appeal to the judicial tribunals of the country

<sup>33</sup> *Op. Atty. Gen.*, II, 482.

<sup>34</sup> 125 U. S. 273.

<sup>35</sup> 128 U. S. 315.

must primarily be decided by the Attorney-General of the United States. . . . We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the Government. . . . But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its existence, and if restrictions are to be placed upon the exercise of this authority by the Attorney-General it is for the legislative body which created the office to enact them."

### § 968. Information to Congress.

The constitutional obligation that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient,"<sup>36</sup> has, upon occasion, given rise to controversy between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.<sup>37</sup>

The discretionary right of the President to refuse information to Congress has been exercised from the earliest times. Thus, President Washington refused to send to the House of Representatives correspondence relating to the British treaty; Presidents Jackson and Tyler similarly refused to transmit information relating to the Maine boundary dispute; President Polk declined to send to the Senate the entire correspondence relating to the Oregon dispute with Great Britain;<sup>38</sup> in 1845 President Polk refused information to the Senate regarding the pending annexation of Texas, and again, in 1848, as to the pending treaty with Mexico; President Fillmore refused a request of the Senate for information regarding negotiations with the Sandwich Islands; President Lincoln refused to transmit correspondence with regard to the slave ship *Wanderer*; and refused to communicate Major Anderson's dispatches from Fort Sumter.<sup>39</sup>

During the administration of Cleveland a vigorous and long-continued controversy was waged as to the right of the Senate or of its committees to obtain from the office of the Attorney General certain papers bearing

<sup>36</sup> U. S. Const., Art. II, Sec. 3.

<sup>37</sup> See Grover Cleveland, *Presidential Problems*.

<sup>38</sup> He said, however, that he was willing that the Senators should individually examine this correspondence at the Department of State.

<sup>39</sup> Cf. Finley and Sanderson, *The American Executive*, pp. 199-200. It may be added that, upon occasion, requests of Congress for information, addressed to heads of the Executive Departments, have, upon direction of the President, been refused.

For an extended argument in support of the proposition that the President may use a discretion in refusing information demanded of him by Congress, see the message of President Tyler in 1842, reprinted in 3 Hinds' *Precedents of the House of Representatives*, 181.

upon certain suspensions from office made by the President. At this time the law of 1867, as amended by that of 1869, was in force, which placed various limitations upon the powers of the President with respect to suspensions and removals from office. One George W. Duskin having been suspended, during the recess of the Senate, from the office of District Attorney, and one J. D. Burnett appointed as his successor, the Senate, when called upon to confirm the nomination of Burnett, through the Judiciary Committee called upon the Attorney General to send to it all papers and information in the Department of Justice bearing upon the nomination of Burnett, as well as "all papers and information touching the suspension and proposed removal from office of George W. Duskin." To this request the following reply was given: "The Attorney-General states that he sends herewith all papers, etc., touching the nomination referred to; and in reference to the papers touching the suspension of Duskin from office, he has as yet received no direction from the President in relation to their transmission."

Previously to this the committees of the Senate had made requests for information upon the heads of various of the other departments, which requests had been refused at the direction of the President. The Senate now, January 25, 1886, however, as a body, and not through one of its committees, made a demand in the following terms: "Resolved, that the Attorney-General of the United States be, and he hereby is, directed to transmit to the Senate copies of all documents and papers . . . in relation to the conduct of the office of District Attorney of the United States for the Southern District of Alabama." To this demand the Attorney-General replied: "In response to the said resolution, the President of the United States directs me to say . . . that the papers and documents which are mentioned in the said resolution and still remaining in the custody of the Department, having exclusive reference to the suspension by the President of George W. Duskin . . . it is not considered that the public interests will be promoted by a compliance with the said resolution." Thereupon the Senate adopted a vigorous resolution of condemnation of the action of the President,<sup>40</sup> declaring it to be "in violation of his official duty and subversive of the fundamental principles of the Government, and of a good administration thereof." Accompanying this resolution majority and minority reports were made by the Judiciary Committee.<sup>41</sup>

President Cleveland, in his message of March 1, 1886, referred to this controversy; and said: "Against the transmission of such papers and documents I have interposed my advice and direction. This has not been done, as is suggested in the committee's report, upon the assumption on

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<sup>40</sup> Feb. 18, 1886. Sen. Misc. Doc. No. 74, 49th Cong., 1st Sess.

<sup>41</sup> Senate Report No. 135, 49th Cong., 1st Sess.



my part that the Attorney-General or any other head of a Department 'is the servant of the President, and is to give or withhold copies of documents in his office according to the will of the Executive and not otherwise,' but because I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain."

In 1909 the Senate passed a resolution directing the Attorney General of the United States to inform the Senate whether legal proceedings had been taken under the Anti-Trust Act of 1890 against the United States Steel Corporation on account of its absorption of the Tennessee Coal and Iron Company, and, if such proceedings had not been instituted, the reason for such non-action; and also whether an opinion had been rendered by him, the Attorney General, as to the legality of such absorption, and, if so, to communicate its substance to the Senate. In reply to this demand the Attorney General transmitted to the Senate a letter he had received from President Roosevelt, giving certain information regarding his own attitude toward the absorption, but concluding with the following statement: "I have thus given to the Senate all the information in the possession of the executive department which appears to me to be material or relevant on the subject of the resolution. I feel bound, however, to add that I have instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for non-action. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever."

This position of the President, thus communicated to the Senate, aroused in that body considerable criticism which led to the introduction of the following Resolution: "Resolved, That any and every public document, paper, or record, or copy thereof, on file in any department of the Government relating to any subject whatever over which Congress has any grant of power, jurisdiction, or control, under the Constitution, and any information relative thereto within the possession of the officers of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdiction."

Upon this Resolution was an extended debate on January 13 and 16,

and February 1 and 3, 1909, in which earlier practices and views were examined. The resolution did not come to a final vote.<sup>42</sup>

The constitutionality of the positions taken by Presidents Cleveland and Roosevelt would seem to be clear. The point has never been precisely passed upon in the courts, but in *Totten v. United States*<sup>43</sup> the court declared that an action against the Government in the Court of Claims upon a contract for secret services could not be maintained because "the secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." The opinion then went on to declare, *obiter*, "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."<sup>44</sup>

### § 969. The President's Pardoning Power.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

This pardoning power, like the veto power, has given rise to very few constitutional questions. It will be seen that the power is limited to offences against the United States. Cases of impeachment are expressly excepted from its reach, and we shall later consider whether it may extend to the remission of penalties imposed for civil contempts of court.

The effect of a pardon is to obliterate the offence, but it does not operate to impair the rights of others, as for example, to restore the offender's property which has been forfeited;<sup>45</sup> nor does it restore one *ipso facto* to a forfeited office.<sup>46</sup> Also, though the pardon takes away the guilt, it does not affect the *fact* of conviction of the crime, which fact may be later shown as bearing upon the offender's character or qualifications. As to this see the article by Professor Williston above cited.

<sup>42</sup> See *Congressional Record* of those dates. See also a related debate in the *Record* for March 3, 1909, and February 10, 1912.

<sup>43</sup> 92 U. S. 105.

<sup>44</sup> It is worthy of notice that there is no official file of the President's correspondence which is preserved for record purposes. This correspondence each outgoing President is entitled to take with him as his personal property. However, it often happens that the President sends correspondence and other material to the various departments or bureaus of the Government which is by them placed in their respective official files.

<sup>45</sup> *Osborn v. United States* (91 U. S. 474). As to the effect of a pardon upon the guilt of the one pardoned, see the article "Does a Pardon Blot Out Guilt?" by Samuel Williston in 28 *Harvard Law Review*, 647.

<sup>46</sup> *Ex parte Garland* (4 Wall. 333).

The power to pardon includes the right to remit part of the penalty as well as the whole, and in either case may be made conditional. The power may be exercised at any time after the offence has been committed, that is, either before, during, or after legal proceedings for punishment.<sup>47</sup> General pardons, granting amnesty to classes of offenders, without naming them individually, may be granted.<sup>48</sup>

### § 970. The Pardoning Power May Not Be Limited by Congress.

The power is a purely discretionary one in the President, and, therefore, may not in any way be limited by Congress. In *Ex parte Garland* <sup>49</sup> the court said: "The power thus conferred is unlimited, with the exception stated [impeachments]. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. . . . A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense . . . there is only the limitation to its operation; it does not restore officer forfeited, or property or interests vested in others in consequence of the conviction of judgment."

### § 971. Acts of Amnesty and Remission of Penalties.

Though Congress has thus no power to limit in any way the exercise of the pardoning power by the President, it may itself exercise that power to a certain extent, if exercised prior to conviction. Thus acts of amnesty have been held valid. In *Brown v. Walker* <sup>50</sup> the act of Congress granting immunity from prosecution to witnesses testifying before the Interstate Commerce Commission was upheld, the court saying: "Although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty."

In *Pollock v. Bridgeport S. B. Co.*<sup>51</sup> it was held that the pardoning power

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<sup>47</sup> *Ex parte Garland* (4 Wall. 333).

<sup>48</sup> See *American Law Register*, VIII (1869), 512, 577, two articles entitled "The Power of the President to Grant a General Pardon or Amnesty for Offences against the United States."

<sup>49</sup> 4 Wall. 333.

<sup>50</sup> 161 U. S. 591.

<sup>51</sup> 114 U. S. 411.

of the President is not so exclusive as to prevent other officers, acting in conformity with statute, from remitting forfeitures and penalties incurred for the violation of laws of the United States. In its opinion the court said:

"It is not necessary to question the soundness of some of these propositions. It may be conceded that, except in cases of impeachment and where fines are imposed by a coördinate department of the government for contempt of its authority, the President, under the general qualified grant of power to pardon offenses against the United States, may remit fines, penalties and forfeitures of every description arising under the laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of that instrument, and was perhaps suggested by legislation in England, which, without interfering with, abridging or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country."

### § 972. Pardons and Amnesties Distinguished.

In *Burdick v. United States*<sup>52</sup> the court said: "It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field in *Knote v. United States*<sup>53</sup> said that 'the distinction between them is one rather of philological interest than of legal importance.' This is so as to their ultimate effect, but there are incidental differences of importance. They are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the state. Amnesty is usually general, addressed to classes or even communities,—a legislative act, or under legislation, constitutional or statutory,—the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted, there is affirmative evidence of acceptance. Examples are afforded in *United States v. Klein*, 13 Wall. 128, *Armstrong's*

<sup>52</sup> 236 U. S. 79.

<sup>53</sup> 95 U. S. 149.

Foundry, 6 Wall. 766, *Carlisle v. United States*, 16 Wall. 147. See also *Knote v. United States*, *supra*. If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion."

**§ 973. Pardons May Be Refused by Persons to whom Tendered.**

In *Burdick v. United States*<sup>54</sup> the interesting doctrine was declared that a pardon from the President to be effective must be accepted by the person to whom it is tendered, and, therefore, that an unaccepted pardon will not operate to destroy the privilege of a witness against self-incrimination, that is, that he may refuse the tendered pardon and refuse to testify on the ground that his testimony may tend to incriminate himself. This holding was based upon *United States v. Wilson*<sup>55</sup> in which the court declared that "a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

In *Biddle v. Perovich*,<sup>56</sup> however, it was held that the President might, against the will of the person concerned, commute a death sentence to one of life imprisonment. The court said: "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done. So far as a pardon legitimately cuts down a penalty it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

"When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will.

"We cannot doubt that the power extends to this case. By common understanding imprisonment for life is a less penalty than death. It is treated so in the statute under which Perovich was tried."

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<sup>54</sup> 236 U. S. 79.

<sup>55</sup> 7 Pet. 150.

<sup>56</sup> 274 U. S. 480.

### § 974. Suspension of Sentences.

The power to suspend sentence, it has been held, is by the common law essentially a judicial power, and its exercise, therefore, is not in conflict with the executive power to grant reprieves and pardons, even were that power considered exclusive.

### § 975. Pardons for Contempts: Relation of, to Separation of Powers.

In *Ex parte Grossman* <sup>57</sup> it was held that the extent of the President's pardoning power should be determined by reference to the common law and to British institutions at the time the Constitution was framed and adopted, and that, so considered, the grant to the President of the power to pardon offences against the United States without qualification (except as to impeachments) was not to be construed as vesting him with authority to remit penalties imposed by courts for civil contempts. The distinction between civil and criminal contempts was emphasized, and the doctrine declared that, while the latter might be pardoned by the President, the former could not be.

As to criminal contempts, the court, while admitting that they are *sui generis* in that proceedings for their punishment are not hedged about by the constitutional safeguards for the accused contained in bills of rights, they nevertheless are, in Federal cases, offences against the United States. As to the argument that, to admit that such contempts may be pardoned by the President renders possible an invasion of the judicial by the executive power and thus violates the principle of the "separation of powers" the court said that this principle is not, and, as many provisions of the Constitution show, was not intended to be an absolute one. After referring to various of these provisions the court said: "These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the other is qualified and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule of construction. The fact is that the judiciary, quite as much as Congress and the executive, are dependent on the co-operation of the other two, that government may go on. Indeed while the Constitution has made the judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look for a continuity of necessary co-operation, in the possible reluctance of either of the other branches, to the force of public opinion.

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To

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<sup>57</sup> 267 U. S. 87.

afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery. A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common-law origin and long years of practice and acquiescence.

"If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this if to be imagined at all would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."

As to the inability of the President to pardon civil contempts the court, after quoting early English authorities, said: "These cases also show that long before our Constitution, a distinction had been recognized at common law between the effect of a king's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the king, in the public interest and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. IV Blackstone, 285, 397, 398; Hawkins, Pleas of the Crown (6th Ed. 1787), vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law. . . . In our own law the same distinction clearly appears. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *Doyle v. London Guarantee Co.*, 204 U. S. 599; *Bessette v. Conkey Co.*, 194 U. S. 324; *Alexander v. United States*, 201 U. S. 117; *Union Tool Co. v. Wilson*, 259 U. S. 107. In the *Gompers* Case this court points out that it is not the fact of

punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions."

#### § 976. The President's Control of Foreign Relations.

In the chapter dealing with the Treaty-Making Power, the extent of the President's control of the foreign relations of the United States is fully considered.

#### § 977. The Veto Power of the President.

The exercise by the President of the veto power has given rise to very few constitutional questions, and, where these have arisen, they have been considered, incidentally, elsewhere in this treatise.<sup>58</sup>

#### § 978. The Ordinance-Making Power of the President.

This power, which of recent years has become so important, will receive treatment in the chapters on "The Separation of Powers" and "The Delegation of Legislative Power."<sup>59</sup>

#### § 979. The Amenability of the President to Compulsory Judicial Process.

As is elsewhere shown, for the performance of a purely ministerial act, a mandamus will lie to the heads of the great departments of the Federal Government, and, *a fortiori*, to their subordinates. We have now to inquire whether the President, the chief executive of the nation, is, with reference to the performance of a purely ministerial act, similarly subject to compulsory judicial process. This question has several times been before the courts, and though not often directly passed upon, a negative answer has been uniformly indicated.

In *Marbury v. Madison*<sup>60</sup> the question was as to the issuance of a mandamus not to the President but to the Secretary of State. It was argued, however, that the Secretary acted as the agent of the President, and that the President, as Chief Executive, was not amenable to the writ. The court, in its opinion, held that the Secretary was, as to the action prayed for, subject to the writ, but conceded that in cases in which the Secretary was but carrying out the political or discretionary will of the President, the writ would not issue. In this case it will be remembered that the court finally refused to issue the mandamus to the Secretary on the ground that

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<sup>58</sup> Chapter XL.

<sup>59</sup> For a comprehensive treatment of the subject see James Hart's *The Ordinance Making Powers of the President*, Johns Hopkins Press, 1925.

<sup>60</sup> 1 Cr. 137.



the provision of the act of Congress giving the original jurisdiction under which the suit had been brought was unconstitutional. President Jefferson, however, declared that had the mandamus been awarded, he would have considered it an infringement upon his executive rights and as such would have resisted its enforcement with all the power of government.

In *Marbury v. Madison* the court did not intimate what its position would be in case the performance directly by the President of merely ministerial duties was prayed.

In the trial of Aaron Burr for treason the amenability of the President to a judicial process was brought directly into issue. Marshall, who was conducting the examination, issued, at the request of the defence, a *sub-pœna duces tecum* directing President Jefferson to appear and bring with him a certain letter to himself from General Wilkinson. Jefferson refused to appear or to bring the letter. That a compulsory process should be thereupon issued to the President does not appear to have been even considered, but upon a discussion as to whether the Attorney General should permit the defence to have the examination of a copy of the letter which had been put into his, the Attorney General's, possession, Marshall said: "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the court in consequence of his not having attended; notwithstanding the subpoena was awarded agreeably to the demand of the defendant, the court would, indeed, not be asked to proceed as in the case of an ordinary individual."<sup>61</sup>

In another account of the same trial, the Chief Justice is reported to have said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of reasons for and against producing it he himself is the judge."<sup>62</sup>

### § 980. *Mississippi v. Johnson.*

In *Mississippi v. Johnson*,<sup>63</sup> decided in 1866, a perpetual injunction was sought to restrain the President from executing the Reconstruction Acts, which were alleged to be unconstitutional. The petition set out that legal secession of a State was impossible, and hence "it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with other States, and that any attempt to do so by secession or otherwise

<sup>61</sup> *Burr's Trial*, III, 37. Published by Westcott & Co., Washington City, 1807.

<sup>62</sup> *Burr's Trial*, II, 536. Hopkins & Earle, Philadelphia, 1808.

<sup>63</sup> 4 Wall. 475.

was a nullity," and that Mississippi "now solemnly asserted that her connection with the Federal Government was not in anywise thereby destroyed or impaired," and averred "that the Congress of the States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity." The petition then went on to declare: "The acts in question annihilate the State and its government, by assuming for Congress the power to control, modify, and even abolish its government—in short, to assert sovereign power over it—and the utter destruction of the State must be the consequence of their execution. They also violate a well-known salutary principle in governments, the observance of which alone can preserve them, by making the civil power subordinate to the military power, and thus establish a military rule over the States enumerated in the act, and make a precedent by which the government of the United States may be converted into a military despotism, in which every man may be deprived of goods, lands, liberty, and life by the breath of a military commander, or the sentence of the military commission or tribunal, without the benefit of trial by jury, and without the observance of any of those requirements and guarantees by which the Constitution and laws so plainly protect and guard the rights of the citizen."

President Johnson had vetoed these acts on the ground of their unconstitutionality. It was charged by the bill that nevertheless he was about to execute these acts. In so doing he would necessarily be performing a purely ministerial act, since, it being known that he personally denied their constitutionality, it followed that in executing them he was simply obeying, without opportunity for discretion, the commands of Congress.

In support of the bill it was argued that the judicial power is extended by the Constitution to *all* cases in law and equity arising under the Constitution, that the President was a creation of the Constitution, and an agent for its enforcement.

In opposition to the bill it was argued that this was a suit against the President officially. "There is," it was asserted, "no allegation that the President is about to do anything of his own motion which as President he is not authorized to do. The allegation is that he is about to execute certain laws passed by Congress."

"It is not upon any peculiar immunity," said counsel, "that the individual has, who happens to be President, upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as in the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court, or the jurisdiction of any court, to bring him to account as President. There is only one court, or *quasi*-court that he can be called upon to answer to for any

dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal, but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President, and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then, for any wrong he has done to any individual, for murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people."

The court, in a very brief opinion, refused to issue the writ, saying:

"The single point which requires consideration is this: can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?"

"It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms 'ministerial' and 'executive,' which are by no means equivalent in import."

After pointing out that the duties sought to be enjoined were executive and political, the court declared that "An attempt on the part of the Judicial Department of the Government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"

"It has been suggested," the court continued, "that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an Act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an Act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State. The motion for leave to file the bill is, therefore, denied."

#### § 981. Georgia v. Stanton.

The court having thus held that the President might not be restrained from executing the Reconstruction Acts an injunction was prayed to restrain the Secretary of War and other military officials from executing them.<sup>64</sup> The court, however, again refused to issue the order, the whole matter being declared political, the *dictum* of Marshall in the Cherokee Nation v. Georgia<sup>65</sup> being the authority chiefly relied upon.

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<sup>64</sup> Georgia v. Stanton (6 Wall. 50).

<sup>65</sup> 5 Pet. 1.

§ 982. Head of Executive Department Acting for the President; when Amenable to Writ.

As was intimated in *Marbury v. Madison*, a chief of one of the executive departments, when acting under the direct orders of the President, with reference to a matter which has, by the Constitution, been placed within the discretionary or political control of the President, is not amenable to the authority of the courts; but that, when not so acting, he is, as to a purely ministerial matter, amenable to compulsory judicial process. This principle was well illustrated in the case of *Kendall v. United States*.<sup>66</sup> This was a case in which a peremptory mandamus was prayed and awarded to the Postmaster-General commanding him to credit the petitioners with certain amounts which had been found due them from the United States by a decision of the Solicitor of the Treasury.

The court said: "The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode presented by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution, and in such case, the duty and responsibility grow out of and are subject to the control of law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character. . . . It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice."<sup>67</sup>

<sup>66</sup> 12 Pet. 524.

<sup>67</sup> The same reason which has supported the immunity of the President from compulsory judicial process has, in several of the States of the Union, supported a similar immunity on the part of the Governor. The scope of this treatise will not permit, however, a discussion of this phase of the question. For a discussion of this subject see the *University Law Review*, III, 335; *Mich. Law Review*, III, 631; *Columbia Law Review*, VI, 453.

**§ 983. Obligation of the President to Enforce Laws Believed by Him to Be Unconstitutional.**

That the President has the right to veto an act of Congress because he believes it to be an unconstitutional measure, even though he thus substitutes his judgment as to this for that of Congress, is beyond doubt. The objection which has sometimes been made that in so doing the President arrogates to himself a judicial function is without weight.

In placing a veto upon a congressional enactment, the President is exercising, not a judicial, but a legislative function. His veto is of the nature of a powerful vote, and his decision as to the way his vote is to be cast must be formed from his own views and opinions. The Constitution gives him the power and he has a right to use it; indeed, it is his duty to use it. He has the right to use his veto upon the ground of unconstitutionality even when a measure of similar character has received previous interpretation by the Supreme Court, and has been sustained. His constitutional right or even duty of thus using his veto power has not been impaired by the manner in which any previous act has been treated. In 1832 Jackson vetoed the bill providing for a recharter of the National Bank. This he did mainly on the ground of unconstitutionality, notwithstanding the fact that in the case of *McCulloch v. Maryland* this institution had been carefully examined by the Supreme Court and pronounced constitutional. In support of his action, Jackson, in his veto message, said: "The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court when it may be brought before them for a judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Jackson was no lover of the Supreme Court, and in this instance certainly stated the case strongly, but in his action he was undoubtedly correct.<sup>68</sup> Whether he acted wisely, or even with proper respect toward the other branches of the government is another question.

Whether the President has the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional, is an entirely different question from that just considered. Here the President has to deal not with a measure in the process of enactment, as is the case when the veto is exercised, but with a bill that

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<sup>68</sup> Van Holst holds a contrary view. *Constitutional History*, I, 46.

has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure. The President has not been given the power to defeat the will of the people or of the legislature as embodied in law. The reasons for maintaining a contrary opinion, as usually stated, are these: The Constitution of the United States is the supreme law of the President as well as of the private citizen. It is his duty to "take care that the laws be faithfully executed," but he is also sworn to "preserve, protect and defend the Constitution," and this he must do upon his own interpretation of the Constitution, and not upon that of others. The Constitution is but a law of high degree, and is, therefore, one of the very laws that he must take care are faithfully executed. Says one writer:<sup>69</sup> "If the President must execute all laws, he must execute an *ex post facto* law or any other law flying in the teeth of the constitution; a partisan statute passed over his veto can rob him of the right to be commander-in-chief, to nominate or remove from office, or of any other right expressly conferred upon him; and it is at once evident that in these cases Congress would be quite as plainly taking away from the President the power which the constitution has expressly given. A two-thirds majority could alter at will many important provisions of the constitution, and the members could only be called to account at a reëlection. That instrument in these cases would not be self-supporting, and would furnish none of those checks of which we have all heard so much. But if the contrary view is true, the check system comes into perfect play; for then the President's right to refuse his assistance to an unconstitutional law will check Congress, while the risk of impeachment will check the President."

The errors in this argument are sufficiently plain. In the first place, the President does not stand upon the same footing as regards the Constitution, as does the private citizen. The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Execu-

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<sup>69</sup> *American Law Review*, XXIII, 375.

tive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.

It is the duty or privilege of a private citizen to refuse obedience to a law, if, upon careful consideration and investigation, he considers it to be unconstitutional, but he does so at his own risk, and if he is wrong he must abide by the legal consequences. Then, too, only his particular interest is directly involved. If, however, it be said that the President also refuses his obedience at his own risk, namely, the danger of impeachment and possible subsequent civil or criminal prosecution, the reply is that, in the first place, a refusal on his part to execute the law nullifies it in all its applications for all people; and in the second place, that impeachment is not a check. As an instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome. If, in the case of the extreme opposition and contest between both Houses of Congress and President Johnson, an impeachment was not successful, it must be admitted that as a means of future restraint upon the Chief Executive it will not be greatly feared.

That the President and all other officers of the government have not the right to refuse obedience to a judgment of the Supreme Court, because he or they believe such judgment to be based upon an incorrect interpretation of the Constitution, scarcely needs argument. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions.

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## CHAPTER LXXXIV

### THE APPOINTMENT AND REMOVAL OF OFFICERS

#### § 984. Constitutional Provisions.

The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

It is also provided that the President "shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," and that he "shall commission all officers of the United States."

#### § 985. "Officer" of the United States Defined.

The definition of the term "officer" of the United States was considered in *United States v. Germaine*<sup>1</sup> and *United States v. Mouat*.<sup>2</sup> In the latter case the court said:

"What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been fully considered by this court in *United States v. Germaine*, 99 U. S. 508. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."<sup>3</sup>

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<sup>1</sup> 99 U. S. 508.

<sup>2</sup> 124 U. S. 303.

<sup>3</sup> See *ante*, § 338, for further discussion of what constitutes an "office" within the meaning of the Constitution. In *Burton v. United States* (202 U. S. 344), the court said: "While the Senate, as a branch of the legislative department, owes its existence to the Constitution . . . its members are chosen by State legislatures, and cannot properly be said to hold their places 'under the Government of the United States.'" This statement was made with regard to the meaning to be attached to the quoted words as used in Section 1782 of the Revised Statutes. *Query* as to the effect of the adoption of the Seventeenth Amendment.



The Constitution, it is seen, fixes absolutely the manner in which certain officers; namely, ambassadors, other public ministers and consuls, judges of the Supreme Court, shall be nominated and appointed. The Constitution itself provides, in other clauses, for the selection of the President, the Vice-President, presidential electors, Senators, members of the House of Representatives, and the officers of the two Houses of Congress. In addition to these officers whose selection is thus constitutionally determined, it would appear that all other officers not properly to be styled "inferior" are to be nominated by the President and appointed by and with the consent of the Senate. The appointment of all other officers of the United States, not mentioned within the foregoing paragraph, is subject to regulation by law of Congress, at least to the extent that that body may determine whether they shall be appointed by the President with the approval of the Senate, or by the President alone, or by the courts of law or by the heads of the departments.

#### **§ 986. Inferior Officers.**

The Constitution does not define the term "inferior officers," but it would appear that in this class are included all officers subordinate or inferior to those officers in whom other appointments may be vested.<sup>4</sup> The point has never been squarely passed upon by the court since Congress has never attempted to vest the appointment of any but distinctively subordinate and inferior positions elsewhere than in the President by and with the consent of the Senate. Should it attempt to determine by law the appointment of heads of the great departments, or even of the heads of important bureaus and divisions and commissions, or even of important local officers, the constitutionality of the law would undoubtedly be subjected to judicial examination.

#### **§ 987. Nominations.**

With reference to the President's power of appointment it is to be observed that nominating, appointing, and commissioning to office are distinct acts.

The nomination is exclusively in the hands of the President. During the first years of the government the suggestion was several times made that the Senate might propose names for nomination to the President; but, whenever made, the suggestion was disapproved of as clearly not warranted by the Constitution. An appointment to office is not completed until signed by the President. Therefore, even after sending a nomination to the Senate and even after the approval of that body has been given, the President may, having changed his mind, refuse his signature to a commission. His signature having once been appended, however, the appointment is complete,

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<sup>4</sup> *Collins v. United States* (14 Ct. of Claims, 569); *United States v. Germaine* (99 U. S. 508).

and the delivery of the commission by the head of the appropriate executive department may be commanded by mandamus, provided, of course, a Federal court has, by statute, been granted jurisdiction to issue the writ. This was determined in *Marbury v. Madison*.<sup>5</sup> In that case, after quoting the clauses of the Constitution conferring the appointing power, and the act of Congress, providing that the Secretary of State shall keep the seal of the United States and affix it to all civil commissions to officers of the United States appointed by the President, by and with the consent of the Senate, Marshall said:

"These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations: 1st. The nomination. This is the sole act of the president, and is completely voluntary. 2d. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. 3d. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'

"The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. . . .

"This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it. But at what stage does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him.

"Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

"The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from

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<sup>5</sup> 1 Cr. 137.

the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. . . .

"The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it."

At times the view has been expressed in the Senate that it is not proper that the President should submit to it for approval a nominee who has been previously rejected by that body for the same office, and especially when such rejection has occurred during the same session at which the nomination is again sent in. In fact, however, there have been a number of instances in which such renewed nominations have been made, and, in some cases, acted upon with approval by the Senate.<sup>6</sup> A striking instance of this was the case of one Waller L. Cohen, who was nominated as Collector of the Customs at New Orleans in 1922 by President Harding. The Senate adjourned without taking any action. The nomination was re-submitted at the next session, and disapproved by the Senate on March 1, 1923. Notwithstanding this, President Coolidge again submitted the nomination to the Senate, and again, on February 18, 1924, that body rejected it. But, on March 17, 1924, the nomination having been renewed, the Senate gave its confirmation to it.

### § 988. Recess Appointments.

By Article II, Section 2, of the Constitution, the President is given the power "to fill all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

The only constitutional controversy which has arisen with reference to this provision is as to when a vacancy may be said to have "happened" during a recess of the Senate, and therefore to have furnished an opportunity for a Presidential appointment.

There are no decisions of the Supreme Court which bear upon this point, though there have been a considerable number of opinions of the Attorney General regarding it, and there has been the practice, in the premises, by the President. The circumstances attending one of the recess appointments may be mentioned.

In 1902 a vacancy in the office of the Collector of Customs at Charleston, South Carolina, occurred during a recess of the Senate. During the next sitting of the Senate the President sent in the nomination of one William D. Crum for the office, but the Senate adjourned without acting upon it. When the Senate reconvened the nomination was again sent in, and again the Senate adjourned without action thereupon. The President then

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<sup>6</sup> For reference to such instances see *Congressional Record*, of March 16, 1925, p. 268.

issued a temporary commission to Mr. Crum as Collector, who took the oath of office and entered upon the discharge of his official duties but without receiving any compensation. The Senate having again convened in special session, Mr. Crum's nomination was again sent in. That session ended at noon on December 7, 1903, and at noon of the same day the regular session began. At that instant, Mr. Crum was again given a temporary commission as Collector by President Roosevelt on the theory that the appointment was made during a "constructive recess" of the Senate, that is, during the constructive period of time between the ending of the special session and the beginning of the regular session of the Senate. In response to a resolution of inquiry on the part of the Senate the Secretary of the Treasury replied that Mr. Crum had taken office, was functioning as such, and that the question whether or not he was *de jure* as well as *de facto* in office was one for determination by the courts and by them only. In response to protests on the part of certain Senators that there had been no real recess during which a temporary appointment could be constitutionally made, a letter was sent to the Committee on Military Affairs of the Senate by Mr. Root, then Secretary of War, in which he called attention to the fact that similar recess appointments in the regular army had been made. In this letter he said that there were two possible views of the situation occurring when one session of the Senate ends and another immediately begins: either that the special session did not end at all but was merged in the regular session (which view he was inclined to accept) or that a constructive recess intervened between the two sessions. As to this second view he said: "There can be no end of a session until a time is reached when there is no session, and the time when there is no session is a recess. The recess may be called 'constructive' but is no more constructive than the end of a session which is assumed to happen. A constructive end involves a constructive recess. A real end involves a real recess. Necessarily, a vacancy caused by the expiration of a commission at the end of a session happens in the recess caused by the end of the session, and it is within the constitutional power of the President to fill up such vacancy."<sup>7</sup> In other words, then, there was, in either case, a recess, if not real, then constructive; if not constructive, then real. In result no action was taken by the Senate.

#### § 989. Do Vacancies "Happen," When They Occur during a Session of the Senate?

It has been contended that the constitutional provision regarding the granting of commissions by the President during recesses of the Senate does not apply when such vacancies occur while the Senate is in session, and which might, therefore, have been filled by the making of regular nominations by the President. The practice of a long line of Presidents,

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<sup>7</sup> See *Congressional Record*, February 4, 1904.

together with opinions of Attorney Generals, support the view that this may be done. To the contention that such vacancies do not "happen" during the recess, the reply has been that the Constitution provision means "happen to exist" for any reason while the Senate is not in session.<sup>8</sup>

#### § 990. Creation of Offices.

All offices are created either by the Constitution itself, or by Congress. The President, therefore, has not the power to create an office by directing some person to perform certain functions. However, the President as well as other executive officials may, for their assistance in executing their official duties, employ persons to perform certain specific duties. These persons have, however, legally speaking, no official powers, that is, they have no authority to issue orders to others, and for compensation for their services they must look either to contingent funds, the expenditure of which is placed in the discretion of the department employing them, or to a subsequent appropriation by Congress.

#### § 991. Appointing Powers of Congress.

The Congress has no appointing power, beyond the selection of its own officers. It may create an office but not designate the one to fill it.

Congress, by acts passed in 1823, 1834 and 1849, directed the judge of the territorial court of Florida and the judge of the district court for the northern district of Florida to act as commissioners for the adjudication of claims arising under the Treaty of 1819 with Spain. This act was held unconstitutional in *United States v. Ferreira*,<sup>9</sup> upon the ground that it attempted to impose the performance of administrative duties upon judicial officers, but the opinion further continued:

"A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the Constitution. The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the Senate; and Congress could not, by law, designate the persons to fill these offices. And if this be the construction of the Constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, everything that has been done under the Acts of 1823, 1834, and 1849,

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<sup>8</sup> For lists of such appointments, and extracts from opinions of Attorney Generals, see *Congressional Record*, January 11, 1915, and March 16, 1925.

<sup>9</sup> 13 How. 40.

would be void, and the payments heretofore made, might be recovered back by the United States."

However, in a case where Congress had provided for a park commission and had provided that two of its members should be existing officers of the United States, the court said:

"It is pointed to as invalidating the act that while Congress may create an office, it cannot appoint the officer. As, however, the two persons whose eligibility it questioned were at the time of the passage of the act and of their action under it, already officers of the United States who had been heretofore appointed by the President and confirmed by the Senate, we do not think that because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted and it has frequently been the case, that Congress may increase the power and duty of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." <sup>10</sup>

It has been held that Congress may authorize a particular person or official to perform a specific act, though it may not create an "office" for that person, in the sense that he is made an officer of the United States or entitled to any emolument or profit." <sup>11</sup>

#### § 992. Power of Congress to Prescribe Qualifications for Officers of the United States.

It is clear that, when Congress prescribes the qualifications that must be possessed by persons who are to be nominated for office by the President, the President's discretionary right to make such nominations is, to such extent, circumscribed. However, practice, which has been acquiesced in since the beginning of the Government, has established the doctrine that such qualifications may be prescribed provided they are not so minute and special as, in effect, to leave to the President no real freedom of choice and to narrow the possible nominees down to particular individuals and thus make them, in effect, the nominees of Congress itself. <sup>12</sup>

It is a rather surprising fact that there are no clear and direct adjudications of the Supreme Court, or, indeed, of the lower Federal courts, as to the constitutionality of this congressional practice. However, in *Myers v. United States* <sup>13</sup> we have the following dictum by Chief Justice Taft:

<sup>10</sup> *Shoemaker v. United States* (147 U. S. 282).

<sup>11</sup> See *Kentucky v. Dennison* (24 How. 66), in which it was declared that Congress might authorize, though it could not compel, State officers to perform certain duties with reference to the interstate extradition of fugitives from justice.

<sup>12</sup> In an appendix to the brief of Senator Pepper, *amicus curiæ* in the case of *Myers v. United States* (272 U. S. 52), there is given a long list of statutes in force imposing restrictions on appointments.

<sup>13</sup> 272 U. S. 52.

“It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided, of course, that the qualifications do not so limit selection and so trench upon Executive choice as to be in effect legislative designation. . . . Article II [of the Constitution] expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise prevented by the Constitution.”

#### **§ 993. Civil Service Requirements.**

The question has been at times raised as to the constitutional power of Congress, while providing for the appointment of officials by the President, or by heads of departments, to require that the appointees shall be selected from certain classes of persons, namely, those who have satisfied specified educational and other tests applied by the Civil Service Commission. Though the courts have never had occasion to pass upon this point, the constitutionality of the provision would seem to be fairly certain. The same sort of rules have long been established and followed with reference to appointments in the army and navy, and the decisions of the State courts support the practice as to the appointment of State officials.<sup>14</sup>

#### **§ 994. Appointing Power May Be Vested Only as Provided by the Constitution.**

The Congress may not vest the appointment of officers elsewhere than, as permitted by the Constitution, in the President alone, the President and the Senate, the courts, or the heads of departments. In *Ekiu v. United States* <sup>15</sup> it is said:

“It was argued that the appointment of Hatch was illegal because it was made by the Secretary of the Treasury, and should have been made by the superintendent of immigration. But the Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than ‘in the President alone, in the courts of law or in the heads of departments’;

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<sup>14</sup> For an argument as to the unconstitutionality of imposing “civil service” requirements upon appointees to the other than inferior officers of the United States, see House Rpt. No. 2008, 61st Cong., 3d sess.

<sup>15</sup> 142 U. S. 651.

the Act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the Secretary of the Treasury; and appointments of such officers by the superintendent of immigration could be upheld only by presuming them to be made with the concurrence or approval of the Secretary of the Treasury, his official head."<sup>16</sup>

### § 995. The Power to Remove from Office.

The Constitution makes no direct provision for the power to remove Federal officers from their offices, and, as a result, there has been continued controversy as to where, with reference to specific officers or classes of officers, this power of removal is constitutionally vested, or where it may be vested by congressional statute. The recent case of *Myers v. United States*<sup>17</sup> has tended to determine some of these doubts, but, as will presently appear, has not disposed of all of them.<sup>18</sup>

It is established that the power to appoint and remove is an executive and not a legislative function, and, therefore, that Congress has no authority in the premises except possibly with regard to inferior officers, whose appointment is vested in the President alone, in the courts of law, or in the heads of departments.<sup>19</sup>

Since the beginning of the Government it has been agreed that the power to remove, in the absence of any constitutional or statutory provision to the contrary, is to be deemed to be implied by, and included within, the right to appoint.<sup>20</sup>

With reference to ambassadors, other public ministers and consuls,

<sup>16</sup> Citing U. S. Const., Art. II, Sec. 2; *United States v. Hartwell* (6 Wall. 385); *Stanton v. Wilkeson* (8 Ben. 357); *Price v. Abbott* (17 Fed. Rep. 506).

<sup>17</sup> 272 U. S. 52.

<sup>18</sup> The author will not attempt in the paragraphs which follow to determine the much disputed question as to the conclusions to be reached from the debate in the First Congress with regard to the President's inherent or constitutional right to remove, or to trace the doctrines deducible from legislation and executive practice since that time, for these questions relate rather to the consistency of the conclusions which have been reached by the Supreme Court as tested by previous practice or precedent, than to the effect of the conclusions themselves. The author will, then, confine his discussion to the propositions which may be said to have been judicially determined by the Supreme Court, especially in the *Myers* case.

<sup>19</sup> "Our conclusion . . . is that Article II grants to the President the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals except only as granted therein to Congress in the matter of inferior officers." Majority opinion in *Myers v. United States* (272 U. S. 52).

<sup>20</sup> The right to appoint Federal judges does not carry with it the right to remove, since it is elsewhere specifically provided in the Constitution that they shall hold office during good behavior.



judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for, and which are established by law, the right to appoint is vested conjointly in the President and Senate.<sup>21</sup> It might seem, therefore, that the power to remove should be regarded as thus conjointly vested. In fact, however, it has been held that this power of removal is vested exclusively in the President. The fact that this power is possessed by the President, in the absence of any congressional provision to the contrary, was, from the first, recognized, but it was not until the decision of the *Myers* case,<sup>22</sup> in 1926, that it was judicially declared that it is not constitutionally competent for Congress to deny to the President the right to remove from office, without the advice and consent of the Senate, officers appointed by him with that advice and consent.

The question whether the President was vested by the Constitution itself with the power, independently of the Senate, to remove officers appointed by him by and with the advice and consent of the Senate was raised and discussed at length in the First Congress, but with a result that has left opportunity for a wide division of opinion as to just what were the premises upon which the final vote was based.<sup>23</sup>

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<sup>21</sup> Unless otherwise provided by Congress with regard to inferior officers.

<sup>22</sup> *Myers v. United States* (272 U. S. 52).

<sup>23</sup> In the opinion in *Parsons v. United States* (167 U. S. 324), the following account of this discussion is given:

"On May 19, 1789, in the House of Representatives, Mr. Madison moved: 'That it is the opinion of this committee that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer to be called the secretary of the department of foreign affairs, who shall be appointed by the President by and with the advice and consent of the Senate; and to be removable by the President.' Subsequently a bill was introduced embodying those provisions. Mr. Smith of South Carolina said that 'he had doubts whether the officer could be removed by the President, he apprehended that he could only be removed by an impeachment before the Senate, and that being once in office he must remain there until convicted upon impeachment; and he wished gentlemen would consider this point well before deciding it.' (1st Lloyd's Cong. Reg., pp. 350, 351.) Then ensued what has been many times described as one of the ablest constitutional debates which has taken place in Congress since the adoption of the Constitution. It lasted for many days, and all arguments that could be thought of by men—many of whom have been instrumental in the preparation and adoption of the Constitution—were brought forward in the debate in favor of or against that construction of the instrument which reposed in the President alone the power to remove from office.

"After a most exhaustive debate the House refused to adopt the motion which had been made to strike out the words 'to be removed from office by the President,' but subsequently the bill was amended by inserting a provision that there should be a clerk to be appointed by the secretary, etc., and that said clerk, 'whenever said principal officer shall be removed from office by the President of the United States, or in any other case of a vacancy,' shall be the custodian of the records, etc., and thereupon the 1st clause, 'that the secretary shall be removable from office by the President,' was stricken

Similarly, there has been difference of opinion, which has continued to the present time, and which is reflected in the prevailing and dissenting opinions rendered in *Myers v. United States*,<sup>24</sup> as to the force, under the doctrine of *stare decisis*, to be given to certain declarations of Chief Justice Marshall in his opinion in *Marbury v. Madison*.<sup>25</sup>

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out, but it was on the well-understood ground that the amendment sufficiently embodied the construction of the Constitution given to it by Mr. Madison and those who agreed with him, and that it was at the same time free from the objection to the clause so stricken out that it was itself susceptible to the objection of undertaking to confer upon the President a power which before he had not. The bill so amended was sent to the Senate, and was finally passed after a long and able debate by that body, without any amendment on this particular subject. The Senate was, however, equally divided upon it, and the question was decided in favor of the bill by the casting vote of Mr. Adams, as Vice-President."

This discussion in the First Congress was again carefully examined by the court in *Meyers v. United States* (272 U. S. 52), but without agreement upon the part of the justices as to what conclusions might properly be drawn from the debate.

<sup>24</sup> 272 U. S. 52.

<sup>25</sup> 1 Cr. 137.

In *Marbury v. Madison* Chief Justice Marshall, in the course of his opinion, stated: "Mr. Marbury, then, since his commission was signed by the President and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."

Commenting upon this implication that this officer was not removable at the will of the President, the Supreme Court, in *Parsons v. United States*, said: "Whatever has been said by that great magistrate in regard to the meaning and proper construction of the Constitution is entitled to be received with the most profound respect. In that case, however, the material point decided was that the court had no jurisdiction over the case as presented."

The court further questioned whether the remarks of Chief Justice Marshall in relation to the right of an appointee to retain possession of an office created by Congress in and for the District of Columbia over which Congress is given by the Constitution exclusive legislative power, would be applicable to offices outside of the District.

In *Myers v. United States* (272 U. S. 52), Chief Justice Taft, who rendered the prevailing opinion, said of the *Marbury v. Madison* case that while it was one of great authority as to the power of the courts to question the constitutional validity of acts of Congress, "it is not to be regarded as such authority in respect to the power of the President to remove officials appointed by the advice and consent of the Senate, for that question was not before the court. . . . The court had . . . nothing before it calling for a judgment upon the merits of the question of issuing the mandamus . . . . The whole statement was certainly obiter dictum with reference to the judgment actually reached. The question whether the officer was removable was not argued to the court by any counsel contending for that view. . . . While everything that the great Chief Justice said, whether obiter dictum or not, challenges the highest and most respectful consideration, it is clear that the mere statement of the conclusion made by him, without any examination of the discussion which went on in the First Congress and without reference to the elaborate arguments there advanced to maintain the decision of 1789, cannot be regarded as authority in considering the weight to be

In the case of *Parsons v. United States*<sup>26</sup> the question was presented whether the President had the power to remove from office, before the expiration of his term, a district attorney who had been duly appointed under an act of Congress which provided that "District Attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates." The court held that, viewing the statute in the light of legislative and executive practice for more than a hundred years, it was not to be believed that Congress had intended, by fixing the term of office to four years, to limit the power of the President to remove before the expiration of that time.

The Tenure of Office Acts of 1867 and 1869, which were repealed in 1886, did, in express terms, limit the President's power of removal, but these acts were passed under peculiar conditions of strife between Congress and the President, they never were brought before the court for the determination of their constitutionality, and, as will be seen, the present opinion is that the acts were unconstitutional.

In *Reagan v. United States*<sup>27</sup> it was impliedly held, however, that an officer appointed by the President by and with the advice and consent of the Senate under an act of Congress, is entitled to notice and a hearing before removal if by statute causes for removal are specified, or the term of office is for a given period. In this case the court held that in fact Congress had not affirmatively specified any causes of removal, but, the court intimated, that, had it done so, notice and hearing would have been necessary before removal.

In *Shurtleff v. United States*<sup>28</sup> the President's power of removal from office was again carefully considered. This case did not require the court to determine whether the President's power of removal was constitutionally exempt from the control of Congress, inasmuch as it held, by a rather strained construction, that, when a Federal officer has been removed from office by the President without notice or an opportunity to defend, it will be presumed that the removal was made from other causes than those specified by Congress, and that this being so, the officer so removed is not

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attached to that decision which . . . he subsequently recognized as a well-established rule of constitutional construction."

Very different, however, is the view of Justice McReynolds with regard to the case of *Marbury v. Madison*, as expressed in his separate dissenting opinion in the *Myers* case. After a statement of the case and the judgment rendered, Justice McReynolds said: "The point thus decided was directly presented and essential to the disposition of the cause. . . . The court must have appreciated that unless it found *Marbury* had the legal right to occupy the office irrespective of the President's will there would be no necessity for passing upon the much-controverted and far-reaching power of the judiciary to declare an act of Congress without effect. . . . But, assuming that it was unnecessary in *Marbury v. Madison* to determine the right to hold the office, nevertheless this court deemed it essential and decided it."

<sup>26</sup> 167 U. S. 324.

<sup>27</sup> 182 U. S. 419.

<sup>28</sup> 189 U. S. 311.

entitled to that notice and opportunity to defend to which he would have been entitled had his removal been based upon one of the causes specified by Congress as justifying removal. And, furthermore, it was necessarily held that the specification by Congress of certain causes for which removal might be made, was not to be construed as declaring, or attempting to declare, that removal should not be made for such other reasons as to the President might seem sufficient.

In *Wallace v. United States*<sup>29</sup> a lieutenant colonel had been dismissed by an order of the President otherwise than as provided by law, namely, in pursuance of the sentence of a court-martial. It was contended that, inasmuch as this officer had been appointed by and with the consent of the Senate, he could not be legally removed except as provided by law or with the approval of the Senate. The court, however, held that, inasmuch as the Senate had approved the appointment of a successor to the removed officer, its consent, if necessary, could be deemed to have been given to the removal. In the course of its opinion the court, after reviewing various legislative acts, including the Tenure of Office Act of 1867, fixing or attempting to fix the conditions under which both civil and military officers might be removed from office, said: "While thus the validity and effect of statutory restrictions upon the power of the President alone to remove officers of the Army and Navy and civil officers have been the subject of doubt and discussion, it is settled<sup>30</sup> that the President, with the consent of the Senate, may effect the removal of an officer of the Army or Navy by the appointment of another to his place, and that none of the limitations in the statutes affect his power of removal when exercised by and with the consent of the Senate. Indeed, the same ruling has been made as to civil officers."<sup>31</sup>

### § 996. *Myers v. United States.*

In *Myers v. United States*<sup>32</sup> for the first time the Supreme Court was called upon squarely to decide whether the President was constitutionally invested with a power to remove officers appointed by him, whether superior or inferior, which could not be limited by congressional provisions. The essential facts in this case were these: One Myers had been appointed, by and with the advice and consent of the Senate, to a postmastership of the first class under an act of Congress which provided that "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or sus-

<sup>29</sup> 257 U. S. 541.

<sup>30</sup> Citing *McElrath v. United States* (102 U. S. 426); *Blake v. United States* (103 U. S. 227); *Keyes v. United States* (109 U. S. 336); *Mullan v. United States* (140 U. S. 240).

<sup>31</sup> Citing *Parsons v. United States* (167 U. S. 324).

<sup>32</sup> 272 U. S. 52.

pended according to law.”<sup>33</sup> Myers was removed from office by Presidential order, while the Senate was in session, and that body did not give its consent to the removal, either expressly or impliedly, by confirming the appointment of a successor to the office from which Myers had been removed. Myers, claiming that his removal had been illegal and therefore void, sued in the Court of Claims for salary due him for the remainder of his term of office.

As stated by Justice Brandeis in his dissenting opinion, the narrow point which the court was called upon to decide was: “May the President, having acted under the statute so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?” The court answered this question in the affirmative.

The author will not attempt to outline or summarize the opinion supporting this proposition in so far as it seeks to bring its conclusions into harmony with earlier judicial *dicta* and legislative and executive practice. A critical examination of these portions of the opinion might or might not lead to a conviction that the court, in the instant case, reached a conclusion that was in complete harmony with its own earlier *dicta* and with executive and legislative practice, but it would throw no significant light upon the actual reasoning or principles employed by the court in support of the conclusion reached by it, or upon the corollaries which it is possible to draw from that conclusion, or, rather, from the reasoning in support of it.

First of all, the court drew a sharp distinction between the power of removal and the power of appointment. These two powers, it was declared, though both executive in character and essential to executive efficiency, are different in character. “A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment.” Therefore, said the court, its possession by the legislative branch cannot be created by implication. “The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filing of offices with bad or incompetent men, or with those against whom there is tenable objection.

“The power to prevent the removal of an officer who has served under

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<sup>33</sup> 19 Stat. at L. 80.

the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."

From these premises the court deduced that, while an executive power to remove may be considered as implied in a power to appoint, when vested in the Chief Executive, it cannot be so implied from a power of appointment when vested in legislative hands, that is, in the Senate or in the two Houses of Congress. The requirement that the Senate shall consent to certain presidential appointments, said the court, must be strictly construed. Indeed, it is intimated that such consent does not, in essence, constitute a participation in the appointing power at all, for the court quoted, with apparent approval, a statement in the First Congress of Oliver Ellsworth to the effect that "The advice of the Senate does not make the appointment. The President appoints."<sup>34</sup> Therefore, the court held, the power to remove not having been expressly granted to the Senate or to Congress by the Constitution, and not being deducible as implied in the powers vested in those bodies with reference to appointments, it is not possessed by them in the sense that, in the absence of congressional statute, the approval of the Senate to the removal of officers appointed by the President with the advice and consent of the Senate must be required, or that Congress may, by statute, provide that executive officials may be removed either by joint action of the two Houses, that is, by Joint or Concurrent Resolution, or by the Senate acting conjointly with the President.<sup>35</sup>

The foregoing reasoning does not wholly deny to Congress authority

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<sup>34</sup> It is to be noted that, in the opinion of the court, the provision in the Constitution that the Senate should advise and consent to certain appointments by the President had for its purpose to quiet the fears of the small States that the President who might be expected to be selected from the large States might make an undue number of appointments from those States if his power of appointing were not subject to a veto of the Senate in which the States were to be equally represented.

<sup>35</sup> It will be observed that this last proposition has reference to "executive" officials. As to the possible significance of this limitation, see *post*, § 1000.

with regard to fixing the conditions under which, and the modes by which, removals from Federal offices may be made. The Constitution expressly declares that Congress may provide that the appointment of "inferior" officers may be made by the President alone, by the courts of law or by the heads of Departments. And, as will later appear, it had been earlier judicially held, and this holding was referred to with approval in the Myers case, that, when Congress, in the exercise of the discretion thus vested in it, places the appointment of inferior officers in other than the President alone, or in him conjointly with the Senate, it (the Congress), may limit and regulate the removal of such officers.

It might seem that, if this congressional right to regulate the removal of inferior officers may properly be deduced from the expressly given power to provide for their appointment, it would be a right of regulation that would apply to cases in which Congress sees fit to vest the appointing power in the President alone or in him with the advice and consent of the Senate, as well as when their appointment is by Congress vested in the courts of law or the heads of departments. In fact, however, the Myers case decides that this is not so, for the reason that to decide otherwise would be to allow the legislature to infringe upon the executive power which, in general and unqualified terms, is vested by the Constitution in the President. In other words, the constitutional power of the President to remove is declared to be derived not only by implication from his expressly given power to appoint with reference to certain specified officers, but also from the general grant of executive power to him by the first clause of Section 1 of Article II of the Constitution, and from the obligation imposed upon him by Section 3 of the same Article to "take care that the laws be faithfully executed."

In order to reach this conclusion the court gave to the executive power a significance and an extent which, prior to the Myers case, it had not previously expressly given to it. In the first place it is emphasized that while the legislative powers given to Congress are specifically enumerated, and its implied powers limited to the making of laws which are necessary and proper for carrying into execution the powers thus given and other powers vested by the Constitution in the Government of the United States or in any department as officers thereof, the executive power is granted in general terms, without qualification or enumeration of specific powers, to the President. Hence, it is argued, that that power, which includes as one of its constituent elements the power to remove executive officials, is an unlimited and unlimitable one, except in so far as the Constitution may expressly otherwise provide. The court said: "The fact that the executive power is given in general terms, strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the Executive is convincing indication that none was intended."

To the argument that the judicial power of the United States is vested in general terms in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish, and yet, that, notwithstanding this, Congress has been recognized to have authority to determine what jurisdictional power shall be severally enjoyed by the courts thus created, the court said that there is no analogy between that grant and the one of executive power to the President. "The judicial power described in the second section of Article III is vested in the courts collectively, but is manifestly to be distributed to different courts and conferred or withheld as Congress shall in its discretion provide their respective jurisdictions, and is not to be vested in one particular court. Any other construction would be impracticable. . . . On the other hand, the moment an office and its power and duties are created, the power of appointment and removal, as limited by the Constitution, rests in the Executive."

The court then, in an elaborate argument, went on to show that, as a matter of practical political or administrative efficiency, the Executive should have, as to officers appointed by him, the right of removal. Especially was this declared to be true of the heads of departments and of important bureaus who act as his political advisers, and through whom his constitutional discretionary powers are exercised. The same considerations of administrative efficiency, though perhaps in less degree, were declared to exist with reference to inferior officials. To quote again from the opinion of the court: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau when he discharges a political duty of the President or exercises his discretion and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him." And, as the court went on to say, when the President does not exercise the power of removal thus vested in him, when, in his judgment, administrative and political reasons require its exercise, he does not discharge his constitutional duty of seeing that the laws are faithfully executed.<sup>36</sup>

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<sup>36</sup> The court said: "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a *quasi*-judicial character imposed on executive tribunals whose decisions after hearing affects interests of individuals, the discharge of which the President cannot in a particular case properly control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed."



The foregoing argument seems to be *ab inconvenienti*, but, in reality, it would appear that the court held it to be more than such. It would appear that the court, finding itself faced with a question which was not expressly dealt with by the Constitution, felt itself obliged, in order to arrive at an answer, to examine into the very nature of executive power, or, at least, into that phase of executive power which has to do with the control which a Chief Executive, as the head of an administrative system, must be expected to have, and, therefore, may be presumed to have been intended to have in default of express constitutional provisions to the contrary. Therefore, it would seem that the argument which appears to be based on expediency merely, in fact, amounts to an inquiry into and conclusion regarding the proper definition to be given to the term "executive power" which is used in, but not defined by, the Constitution. The right of courts to resolve such ambiguities by resort to practical considerations is, of course, well recognized.

The Myers case may, then, be said to establish the proposition that Congress has no constitutional power to limit the President's power to remove from office either those officers whose appointment is vested in him (by and with the advice and consent of the Senate) by the Constitution, or those inferior officers, the appointment of which Congress has seen fit to vest in him with the advice and consent of the Senate. As to this the language of the court needs to be quoted. The court said: "The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the Perkins case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause, and to infringe the constitutional principle of the separation of governmental powers."

#### **§ 997. Power to Remove Officials whose Appointment Is Vested by Congress in the President Alone.**

The power of Congress to regulate the removal of inferior officers whose appointment it has vested in the President alone, that is, without the

necessity of confirmation by the Senate, would appear to be still uncertain. There have been no direct adjudications upon this point, and, in the Myers case, the court said: "Whether the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone would make his power of removal in such case any more subject to congressional legislation than before is a question this court did not decide in the Perkins case. Under the reasoning upon which the legislative decision of 1789 was put it might be difficult to avoid a negative answer, but it is not before us and we do not decide it."

**§ 998. Power to Remove Officers whose Appointment Is Vested by Congress in the Courts of Law or the Heads of Departments.**

There appears to be a consistent line of cases holding that where Congress has seen fit to vest the appointment of officers in the courts of law or the heads of departments, it may also provide that they may be removed from office by such courts or departmental heads.

In *United States v. Perkins*<sup>37</sup> was involved the power of the Secretary of the Navy to dismiss from office a cadet engineer who had not been court-martialed, and who had been appointed by the Secretary under a law which provided that cadet engineers should not be dismissed from office except in pursuance of a sentence of a court-martial. The court held that he could not be thus removed, and said: "It is further urged that this restriction of the power of removal is an infringement upon the constitutional power of the Executive. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution does not arise in this case and need not be considered. We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it seems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a Department has no Constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

In *Ex parte Hennen*,<sup>38</sup> a case involving the validity of the removal of a clerk of the district court of Louisiana by the district judge thereof, it was said by Mr. Justice Thompson, in speaking of the power of removal:

"In the absence of all constitutional provision, or statutory regulation,

<sup>37</sup> 116 U. S. 483.

<sup>38</sup> 13 Pet. 230.

it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."

And, in speaking of the different language employed in the act establishing the Navy Department from that which was used in regard to the Department of State, the learned justice further remarked: "The change of phraseology arose, probably, from its having become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone, in such cases, although the appointment of the officer was by the President and Senate."

In the Myers case <sup>39</sup> this right of Congress to limit the removing power of executive heads with reference to officers the appointment of whom has been vested in them by Congress was, as we have seen, fully approved although the point was not involved in the case.

It is thus seen that it is established that Congress may vest the removal power in department heads when the appointments are vested in them. There possibly is still unsettled, however, the question whether there remains also in the President a power to remove such officers, derived from the Constitution, of which power Congress cannot deprive him.

It is perhaps worth noting that, even if it should be held that the power of the President to remove inferior officers may be defeated by vesting their appointment in courts of law or in the heads of departments, it would still be possible for him, as a practical proposition, with regard to appointments by heads of departments, to secure the removal of such appointees by the same means which President Jackson employed to secure the removal of the bank deposits. This pressure could not be exerted upon the Federal courts, since their judges cannot be removed by the President.

**§ 999. May Congress Provide that Congress Itself, or Either House thereof, Shall Have the Power to Remove, or to Participate in Removals?**

There is no direct judicial decision upon this point, but the reasoning in the Myers case would indicate that this may not be done, and, in fact, there

<sup>39</sup> Myers v. United States (272 U. S. 52).

is the following direct statement in the opinion to that effect: "The court never has held nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implication of that clause and to infringe the constitutional principle of the separation of powers." <sup>40</sup>

**§ 1000. Amenability to Removal of the Comptroller General and the Assistant Comptroller General under the Budget and Accounting Act of 1921.**

Under the Budget and Accounting Act of 1921 provision is made for a Comptroller General of the United States and an Assistant Comptroller General who are to be appointed by the President with the advice and consent of the Senate. With regard to the terms of office and removability of these officials, Section 303 of the act provides that they shall hold office for fifteen years and that they "may be removed at any time by Joint Resolution of Congress <sup>41</sup> after notice and hearing, when in the judgment of Congress the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any Comptroller General or Assistant Comptroller General removed in the manner herein provided shall be ineligible for reappointment to that office. When a Comptroller General or Assistant Comptroller General attains the age of seventy years, he shall be retired from office."

This act was approved by President Harding without raising any question as to the constitutionality of the provision which has been quoted. It is, however, perfectly clear that, under the decision of the Supreme Court in the Myers case, this provision is unconstitutional unless it can be held that the Comptroller General and Assistant Comptroller General are not "executive" officers of the United States. The fact is, as has appeared in the various quotations which have been made from the prevailing opinion in that case, that the court seemed to take care to limit to "executive" officers the application of the doctrine it declared as to the lack of constitutional power upon the part of Congress to control the power of removal of

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<sup>40</sup> The excepting clause to which reference is made is of course that which provides that Congress may vest the appointment of inferior officers in the President alone, in the courts of law or in the heads of departments.

<sup>41</sup> The Budget Bill which was vetoed by President Wilson on the ground that it would unconstitutionally limit his constitutional power of removal had provided that the Comptroller General and Assistant Comptroller General could be removed only by a Concurrent Resolution of Congress, that is, by a Resolution which does not require presidential approval, and which therefore is not subject to possible presidential veto.

the President with reference to officers appointed by him alone or by and with the advice and consent of the Senate.

The argument that the Comptroller General and the Assistant Comptroller General are not "executive" officers, is based upon the ground that their duties relate wholly to guaranteeing that the directions of Congress with reference to the expenditure of, and the accounting for, moneys appropriated by Congress are in accordance with the declared will of Congress, and that, as so viewed, they are agents of Congress, and, therefore, legislative rather than executive officers.

In support of this contention it is to be noted that the Budget and Accounting Act, when establishing the General Accounting Office, declared that it should be "independent of the executive departments and under the control and direction of the Comptroller General of the United States," and, indeed, the essential purpose of the act with reference to the creation of this office and the vesting in its head of powers of financial control was to obtain an agency which, by reason of being independent of the executive and only by that reason, would be able to act as an effective check upon departures on the part of the executive services of the government from the legislative will of Congress.

As further showing the intention of Congress with reference to this point, it is to be noted that the act provides that the Comptroller shall exercise his duties "without direction from any other officer," and that he is required to report directly to Congress and not through the agency of the President or any other organ or officer of the executive branch of government.<sup>42</sup>

It is to be noted that Ex-Solicitor General Beck, who was of counsel for the United States in the Myers case, has since expressed the opinion that the ruling in that case does not necessarily cover an officer such as the Comptroller General. Analyzing the scope of the decision in that case

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<sup>42</sup> The following duties imposed by the act upon the Comptroller General may, in this connection, be noted:

"He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

"The Comptroller General shall specially report to Congress any expenditure or contract made by any department and establishment in any year in violation of law.

"He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers."

Generally, with regard to status and duties of the Comptroller General, see W. F. Willoughby's *The Legal Status and Functions of the General Accounting Office of the National Government*. This volume is one of the "Studies in Administration" issued by the Institute for Government Research (Johns Hopkins Press, 1927).

he has said: "Moreover, the decision does not decide whether or not there may not be a class of officers who are not in strictness executive officers. For example, the Federal Trade Commission is chiefly a fact-finding commission, to aid Congress in formulating legislation. The Interstate Commerce Commission is a fact-finding commission which discharges the so-called legislative duty of imposing reasonable rates upon carriers. The Comptroller General is regarded as the special representative of Congress in seeing that its appropriations are faithfully disbursed. Can the President remove such *quasi*-legislative officials? This [Myers] decision is not conclusive upon this point, and properly so; for no case of this character was before the court." <sup>43</sup>

### § 1001. Removal of Army and Navy Officers.

The act of July 13, 1866,<sup>44</sup> which is now in force, provides that "no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." <sup>45</sup> The question has been raised whether the decision of the Supreme Court in the Myers case, holding unconstitutional the act of July 12, 1876,<sup>46</sup> with reference to the removal of postmasters may not be used to support a holding that the law which has been quoted regarding the dismissal of military and naval officers is also unconstitutional.<sup>47</sup>

It may be noted that Congress has also made provision for the "retirement" of military and naval officers on account of superannuation or disablement, and for their discharge as "Class B" officers, upon the finding of a board of their senior officers that they have been guilty of neglect or misconduct, or avoidable habits." <sup>48</sup>

### § 1002. Injunction to Prevent Removals.

In *White v. Berry* <sup>49</sup> it was held that the jurisdiction to determine the title to a public office belongs exclusively to courts of law, to be exercised by them by mandamus, certiorari, quo warranto or information in the nature of a writ of quo warranto, according to the circumstances of the case, and according to modes of procedure established by common law or by statute, and not by courts of equity by injunctive relief.

<sup>43</sup> *New York Times*, November 7, 1926.

<sup>44</sup> 14 Stat. at L. 90.

<sup>45</sup> This provision appears also in the 118th Article of War, and is included in the act of June 4, 1920 (41 Stat. at L. 759).

<sup>46</sup> 19 Stat. at L. 80.

<sup>47</sup> See article "The Power of the President to Remove Officers of the Army" in 15 *Georgetown Law Journal*, 168.

<sup>48</sup> 41 Stat. L. 759, Sec. b.

<sup>49</sup> 171 U. S. 366.

**§ 1003. Mandamus to Reinstate in Office.**

In *Keim v. United States*<sup>50</sup> it was held that the action of the Secretary of the Interior in discharging a clerk in his department for incompetency was not subject to review in the courts either by mandamus to reinstate him or by compelling the payment to him of his salary. The court said:

"The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

"In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. 'It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' *Re Hennen*, 13 Pet. 225; *Parsons v. United States*, 167 U. S. 324. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed."

**§ 1004. Power to Suspend from Office.**

The power to suspend public officials from office has received almost no specific consideration in the Federal courts. In general, the power, in the absence of constitutional or statutory authorization, has been deemed to be implied in the power to remove.<sup>51</sup>

In 1886, when called upon by the Senate to send to it papers relating to a suspension of office made by him, President Cleveland, in a communication to the Senate, denied that there was any constitutional obligation upon his part to do what had been asked of him. He said: "I am . . . led unequivocally to dispute the right of the Senate by the aid of any documents whatever, or in any way save through the judicial process of trial on impeachment, to review or reverse the acts of the Executive in the suspension, during the recess of the Senate, of Federal officials.

"I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that 'the executive power shall be vested in a President of the United States

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<sup>50</sup> 177 U. S. 290.

<sup>51</sup> This statement is made in *Burnap v. United States* (252 U. S. 512).

of America,' and that 'he shall take care that the laws be faithfully executed.'

"The Senate belongs to the legislative branch of the Government. When the Constitution by express provision superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duty, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions."

In the dissenting opinion of Justice Brandeis in *Myers v. United States*<sup>52</sup> we find the statement: "It is not questioned here that the President, acting alone, has the constitutional right to suspend an officer in the executive branch of the Government." In certain cases, acts of Congress have expressly authorized the President to suspend from office, but, so far as the author is aware, there have been no cases in which a direct examination has been made and adjudication had with reference to the power of the President to suspend from office in default of express statutory authorization.<sup>53</sup>

<sup>52</sup> 272 U. S. 52.

<sup>53</sup> *Cyc., sub nom.* "Officers," states: "Where no express power to suspend has been granted the courts do not recognize that power is included within the arbitrary power to remove, for the exercise of the power to suspend will produce an interregnum in office. The ends of discipline in such a case may be sufficiently subserved by the exercise of the power of removal and do not require the recognition of a power to suspend." The supporting authorities are, however, State decisions, and especially *Gregory v. New York* (113 N. Y. 416).

The doctrine of the State courts with regard to the executive powers of State Governors is quite different from that of the Federal courts with regard to the executive powers of the President, and this is reflected in the doctrines regarding the powers of appointment and removal. Although it is not the province of the present work to discuss the constitutional law of the States, except in so far as it is related to, or grows out of Federal constitutional law, the author has deemed it worth while to add the following note regarding the power of removal of State Governors.

*The Powers of Removal by State Governors.* From the foregoing pages it is seen to be established that the right of removal from office is in the President. In the States, this doctrine does not apply to the governor. Here it has been generally held that he has no inherent powers of removal, in this respect the powers of the State executive contrasting with those of the Federal executive in a manner similar to that in which the governor's powers of administrative control are contrasted with those of the President. This general contrast between the State gubernatorial and the Federal presidential offices is well set out in the case of *Field v. Illinois* (3 Ill. 79). The court said:

"The reasoning in favor of the Governor's authority to remove the Secretary, because of the latter's duty to register his official acts, can have no application to the Secretary of State; an officer whose office is created, and whose duty to keep a register of the



acts of the Governor is prescribed by the Constitution. In the performance of this, as of other duties, he does not act as the Governor's officer, subject to his control and direction, but as the officer of the Constitution, bound to the performance of such duties only as have been assigned by that instrument and the law.

"The injunction, that the Governor shall see that the laws are faithfully executed, it is also urged, gives him the control, and consequently the power of removal of the officers of the executive department. This inference is not justified by the premises. It has neither the sanction of authority nor the practice of other State executives, both of which are opposed to it."

"As the right of appointment to office has not been given to the Governor as a general rule, as it has to the President, the analogy between their powers relied upon does not hold good; and whatever may be the theoretical or political denomination of this power under other governments, it cannot be considered an executive function under our Constitution, because it does not belong to the executive.

"So diversified is the practice of the governments of the States, in reference to the appointment of officers, that no general rule can be deduced from it; certainly none to justify the assumption that it is an executive function. Under these governments, then, it is an executive, or legislative, or popular function or power, according as the respective constitutions have made it so.

"The disparity between the powers of the President and Governor is not greater in reference to appointment to office than it is in reference to their supervision and control of the officers of the executive department, when appointed.

"The Constitution of the United States and of this State contain the same declarations that the executive powers of the government shall be vested in the respective executives; and in the Constitution of the first, this declaration is carried out by its other provisions. It creates no other officers in whom a portion of this power is vested or required to be vested by law. Those officers whom the President may remove are created by law, as aids and helps to him in the performance of his duties. But the declaration in our Constitution, that the executive power of the government shall be vested in the Governor, is to be understood in a much more limited sense; inasmuch as, by its other provisions, it is greatly circumscribed and narrowed down. Unlike the Constitution of the United States, ours has created other executive officers, in whom a portion of this power is required to be vested by law, not to be assigned by the Governor.

"As, by the Constitution of the United States, the President has the control of the whole executive department, it having created no other officers in whom any portion is vested, or required to be vested by law; and as those who are to assist him in its administration are by law placed under his supervision and control, he thereby becomes politically responsible for its proper administration. This responsibility was strongly urged as a reason for giving him authority to remove those officers for whose conduct he was responsible.

"Here, again, is a contrast, in place of an analogy, between the powers and responsibility of the executives of the two governments; and also between the character and accountability of the executive officers of the respective governments.

"The Governor is, neither in fact nor in liberty, personally nor politically responsible for the official conduct of the Secretary, or any other officer. He cannot assign him the performance of a single duty or control him in the performance of those assigned by law. He does not move in the executive circle, as has been said, but in that marked out by the Constitution and by the law, separate, distinct from, and independent of, that of

the Governor. He looks to the law for his authorities and duties, and not to the Governor; and to that, and that alone, he is responsible for their performance.

“From this comparison between the powers of the President and Governor, and between the character, duties, and accountability of the officers, whom the President may remove, and the Secretary of this State, there is no similarity, so far as regards the decision of this case; and, by an examination of the debates of 1789, it will be seen that the concession to the President, of the power now claimed by the Governor, was made for reasons which cannot apply to it. Convenience and a supposed necessity may have had some influence, but, from the general scope and tendency of the arguments of the advocates of the President’s power, there would seem to be no doubt that the concession was made because of the general grant to him of the executive power; his entire control over, and responsibility for, the proper administration of the executive departments; and because of his right to prescribe the duties of the officers of the departments, and supervise and control them in the manner of their execution.

“In every respect, then, in which I can view this case, I am constrained, according to the convictions of my mind, to say, that the Governor has no power under the Constitution to remove from office the Secretary of the State, at will and pleasure. No express grant of this power is to be found in the Constitution; nor can it be implied from any of its provisions. It is not a power necessary, as has been shown, to the exercise of any of the powers expressly delegated, or the performance of any of the duties enjoined upon the executive.”

## CHAPTER LXXXV

### MILITARY AND WAR POWERS

#### § 1005. Military Powers of the General Government.

Under the Articles of Confederation the General Government had not been granted adequate military authority. To it had been conceded by the States the power to "build and equip a navy." But for its land forces it was obliged to rely wholly upon requisitions made upon the States, each State being pledged to supply a quota in proportion to the number of its white inhabitants. The regimental officers of these forces were appointed by the States, only the general officers being appointees of the General Government. From these quotas the national forces were supplied. Over the militia bodies of the several States, the General Government was given no control whatever.

Under the present Constitution, the Federal Government is given full power for the organization and maintenance of both naval and land forces of its own, and a considerable authority over the State militia forces. The constitutional clauses in which these powers are granted are as follows:

"The Congress shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."<sup>1</sup> The second article of amendment to the Constitution provides that "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

Other clauses of the Constitution give to the United States the power to exercise exclusive authority "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings;"

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<sup>1</sup> Art. I, Sec. 8.

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" and "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."<sup>2</sup>

There is thus apparent the purpose to equip the National Government with adequate military authority to maintain itself against enemies both domestic and foreign. Upon the other hand, while the States are not deprived of military authority necessary to maintain domestic order or to protect themselves against invasion, the maintaining of armed forces for any other purpose, or the engaging in war, or entering into alliances that may lead to war, is forbidden. By Clause 3 of Section 10 of Article I it is declared: "No State shall, without the consent of Congress, lay any duty of tonnage, keep any ships-of-war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Section 4 of Article IV declares that "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

#### **§ 1006. Military Law: With Reference to Members of the Army and Navy.**

The Constitution provides, as has been seen, that Congress shall have the power to provide and to make rules for the government and regulation of the land and naval forces. It is also provided that the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States.<sup>3</sup>

Under these grants of power, Congress has established an army and navy, and by laws, passed from time to time, has provided the rules by which the respective powers and duties of the officers and men constituting this military establishment are to be determined and exercised. Collectively, these rules are known as the Military Laws of the United States.

#### **§ 1007. Articles of War.**

The chief of these military laws, so far as they relate directly to the duties and obligations of the individual soldier, are embodied in the so-called Articles of War, which constitute Sections 1342 and 1343 of the Revised Statutes.<sup>4</sup>

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<sup>2</sup> Art. I, Sec. 8.

<sup>3</sup> Art. II, Sec. 2, Cl. 1.

<sup>4</sup> For an annotated text of these Articles of War, see *Military Laws of the United*

With the details of this considerable body of statutory law we are not here concerned. With its general character, and especially with its relations to the other civil portions of the law of the land, we are, however, interested.

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*States*, 6th ed. 1921, pp. 1443-1506. From this source the following historical note is taken:

"In the early periods of English history military law existed only in time of actual war. When war broke out troops were raised as occasion required, and ordinances for their government, or, as they were afterwards called, Articles of War, were issued by the Crown, with the advice of the constable or of the peers or other experienced persons, or were enacted by the commander in chief in pursuance of an authority for that purpose given in his commission from the Crown.

"These ordinances or articles, however, remained in force only during the service of the troops for whose government they were issued, and ceased to operate on the conclusion of peace. Military law in time of peace did not come into existence until the passing of the first mutiny act in 1689.

"The system of governing troops in active service by articles of war, issued under the prerogative power of the Crown, whether issued by the King himself, or by the commanders in chief, or by other officers holding commissions from the Crown, continued from the time of the Conquest till long after the passing of the annual mutiny acts, and did not actually cease till the prerogative power of issuing such articles was superseded in 1803 by a corresponding statutory power.

"The earlier articles were of excessive severity, inflicting death or loss of limb for almost every crime. Gradually, however, they assumed something of the shape which they bear in modern times, and the ordinances or articles of war issued by Charles I in 1672 formed the groundwork of the Articles of War of 1878, which were consolidated with the mutiny act in the army discipline and regulation act of 1879, which was replaced by the army act of 1881. The army act of 1881, which now constitutes the military code of the British army, has of itself no force, but requires to be brought into operation annually by another act of Parliament, thus securing the constitutional principle of the control of the Parliament over the discipline requisite for the government of the army.

"The Rules and Articles of War [of the United States] were derived originally from the English mutiny act and articles of war under the following circumstances: In May, 1775, the Continental Congress met in Philadelphia and at once proceeded to levy and organize an army. A system of rules for its government was, of course, indispensable. The members of this Congress were naturally familiar with the English military code. The local troops serving with the English forces sent to this country in 1754 had been brought under the mutiny act, while the armies of Gage and Burgoyne were governed by the English code at the time the first 'Continental troops' were raised. It was but natural, therefore, that this body should turn to the mutiny act as a model, and on June 30, 1775, the Congress promulgated articles, 69 in number, for the government of the Continental troops. These articles were adopted from the English, in the same form as our present articles, modified, however, to meet the milder views which were entertained by a people who entertained an objection to a standing army. Additions were made in November of this year, but were repealed by the act of September 30, 1776, and new articles adopted. These articles, 102 in number, were modeled upon the British form and were arranged in 18 sections. With some modifications they remained in force until 1806.

"In September, 1789, they were formally recognized and adapted to the new Constitution by the First Congress of the United States. In 1806 the articles, 101 in number,

**§ 1008. Obligations Assumed by Enlistment.**

By enrollment in the military forces of the United States, the individual assumes new obligations, and is subjected to certain forms of control to which he was not before subject. But he does not lose his right to the protection of the civil and criminal law, nor is he released from any of his obligations thereunder. Thus the enlisted soldier comes under an obligation to obey all the provisions of the military code, and for the violation of any one of them is subject to trial before a military court, a court-martial, and, upon conviction, to punishment ranging in severity from a small fine or short imprisonment to loss of life. In cases of urgency, which do not admit of delay, he may be summarily punished by order of his superiors, without even a court-martial being convened. Furthermore if the act for which he is tried, convicted and punished by the military authorities, is also an offence against the general law of the State in which he is, he may be tried, convicted and punished by the civil authorities of that State.<sup>5</sup> Still further, as we shall see, if, in justification of his act, he sets up the command of his military superior, it must appear that that order was one which that officer had authority to give. Thus the soldier may at times find himself in the dilemma that if he refuse to obey the order of his military superior, he will receive immediate military punishment; whereas, if he obey it, he will later be held civilly and criminally liable in the ordinary courts. This dilemma, though easily conceivable, is not, in fact, often a serious one, for the soldier will not be held civilly and criminally responsible except in cases where he had grounds for knowing that the act ordered to be committed was not a proper one and not within the official power of his superior to command. The late Justice Stephen in his *History of the Criminal Law of England*, has stated the doctrine upon this point and the reasons for it, as follows:

"I do not think, however, that the question of how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dan-

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were rearranged and promulgated by Congress; the divisions into sections were dropped and the old model substituted. These, with five or six modifications, remained in force for nearly seventy years, and were the governing code of the Army until the passage of the act of June 22, 1874. (18 Stat. at L. 113.) These articles are embodied in the Revised Statutes as sections 1342 and 1343 of that work."

<sup>5</sup> But not again for the same offence in a Federal court. *Grafton v. United States* (206 U. S. 333).

gerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army.”<sup>6</sup>

But, just as the individual soldier is still answerable in all respects to the non-military law of the State, so are his superiors when giving commands, as are also the members of courts-martial and of other military tribunals, when trying him, and the persons by whom the orders of such tribunals are carried into effect; and if any act is by them ordered or committed which is not warranted by the law of the land, they may be held civilly and criminally responsible by the ordinary courts. Not even the order of the President himself, the constitutional commander-in-chief of the army and navy, if that order be without authority of law, is sufficient to justify the performance of the act commanded. This principle is excellently illustrated in the case of *Little v. Barreme*<sup>7</sup> which was an action in trespass against a naval officer who had seized the plaintiff's ship in obedience to an order of the President, which order was, however, based upon a misinterpretation by him of an act of Congress. In rendering his opinion, Chief Justice Marshall said:

“I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between the acts of the civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act,

<sup>6</sup> *Op. cit.* I, 205.

<sup>7</sup> 2 Cr. 170.

ought to justify the person whose general duty it is to obey them and who is placed by the laws of his country in a situation which in general requires that he should obey them. . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in the opinion of my brethren, which is that the instructions cannot change the nature of the transgression, or legalize an act which without them would have been a plain trespass.”<sup>8</sup>

Even when the writ of habeas corpus is suspended, a person making an illegal arrest is liable therefor, criminally as well as civilly.<sup>9</sup>

In *Mitchell v. Harmony* <sup>10</sup> it is said: “It can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it cannot justify.”

Such is the general rule, but the requirements of justice and expediency have, at times, prevented it from being pushed to its full logical conclusions.<sup>11</sup>

The qualifications which apply to the legal responsibilities under which military persons, officers or privates, act, when there exists what is called Martial Law, will be considered when that subject is reached for specific consideration.<sup>12</sup>

The legal responsibilities under which members of the army or navy, officers or privates, act, during time of public war, whether in their own or the enemy's territory, will also receive discussion later on.<sup>13</sup> It may be here said, however, that the powers of a military commander, in the control of his own men and over private individuals, while much broader than they are in time of peace, are, nevertheless, still subject to limitations which the civil law imposes. And, even with respect to enemy persons and property, he is subject to the limitations which the “laws of war,” as determined by enlightened international usage imposes. However, for the violation of these laws of war in enemy territory to the injury of enemy persons or property, he is responsible only to military tribunals.<sup>14</sup>

In *Dow v. Johnson* <sup>15</sup> was squarely presented the question whether, upon the ground that his acts were not justified by the necessities of war, an officer of the United States army is liable to a civil action in the

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<sup>8</sup> In *United States v. Lee* (106 U. S. 196), the court said: “No man in this country is so high that he is above the law. No officer of the United States may set that law at defiance with impunity.”

<sup>9</sup> *Griffin v. Wilcox* (21 Ind. 372).

<sup>10</sup> 13 Wall. 115.

<sup>11</sup> For a discussion of this point, see § 1053.

<sup>12</sup> See Chapter LXXXVII.

<sup>13</sup> See Chapter LXXXVI.

<sup>14</sup> Whether or not Congress may, by what amounts to acts of indemnity, later passed, protect military officials of the United States against civil or criminal suits brought against them in the civil courts for illegal acts committed during time of war, will be later discussed. See *post*, p. 1610.

<sup>15</sup> 100 U. S. 158.



local tribunals for injuries resulting from acts ordered by him in his military capacity, while in the enemy's country. After showing that the Civil War in the United States, though a civil one, was, nevertheless, a public war, the court, with reference to the military occupation of enemy territory, said: "As a necessary consequence of such occupation and domination, the political relations of its people to their former government are, for the time, severed. But for their protection and benefit, and for the protection and benefit of others not in the military service, or, in other words, in order that the ordinary pursuits and business of society may not be unnecessarily deranged, the municipal laws, that is, such as affect private rights of persons and property, and provide for the punishment of crime, are generally allowed to continue in force, and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing, unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals." And, later, the court said: "We do not controvert the doctrine of *Mitchell v. Harmony*<sup>16</sup>; on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our Government. The question here is: What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law, the law of war, and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home and, in time of peace, is essential to the preservation of liberty."

**§ 1009. State Jurisdiction over Federal Military Officials and Privates.**

As has been earlier stated, a member of the United States army or navy, or of any other military service of the United States, is, in time of peace, subject to the civil and criminal law of the States of the Union in which they may happen to be, whether in pursuance of the duties imposed on them by Federal law, or of private and personal interests; and, as thus obligated to the local law, may be subjected to civil and criminal processes of the State's courts, provided that it is deemed by the Federal authorities that the Federal Government is not, by the execution of such processes,

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<sup>16</sup> 13 How. 115.

unduly or unreasonably deprived of the services of its military officers or subordinates. It would appear, then, that it is always within the right of the Federal courts to determine, by habeas corpus proceedings, in each individual case, whether or not this is a fact, as well also as to determine whether the act charged against the defendant as a violation of the criminal law of the State was authorized and therefore justified by Federal law.<sup>17</sup> It would appear, however, that this right of the Federal courts is one that should be used with great discretion. In *Baker v. Grice*<sup>18</sup> the Supreme Court said: "It is an exceedingly delicate jurisdiction given to the Federal courts by which a person, under an indictment in a State court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State court of an indictment found under the laws of that State be finally prevented. Cases have occurred of so exceptional a nature that this course has been approved."<sup>19</sup>

In *Re Turner*<sup>20</sup> an officer was enjoined by a State court from obeying orders received by him from the Secretary of War, and, this injunction having been disregarded, was proceeded against for contempt. The Federal court, upon writ of habeas corpus, released him, and said: "An officer of the United States army, in the discharge of his duty, acting in obedience to commands by the Secretary of War, who in turn is executing an act of Congress, is not subject to arrest on a warrant or order of a State court. . . . The arrest, under authority of a State, of a Federal officer, and that officer one of the Federal army in the performance of a command by a superior which he dare not disobey, presents a matter of urgency, and it is within the discretion of the Federal court at once to take cognizance of the case, and act at once, rather than allow the case to be carried through three courts taking two or three years of time."

It will be observed that this case was not so much one of conflict between the civil and military authorities, as it was between the State and Federal authorities.

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<sup>17</sup> *United States v. Lipsett* (156 Fed. Rep. 65).

<sup>18</sup> 169 U. S. 284.

<sup>19</sup> In *Drury v. Lewis* (200 U. S. 1), this language was quoted with approval by the court, but the accused was remanded to the State court for trial as the evidence was conflicting as to whether he had acted under Federal authority.

In *Ex parte Schlaffer* (154 Fed. Rep. 921), a United States soldier who had been sentenced to an imprisonment of sixty days for the violation of a municipal ordinance, was taken out of State custody, on habeas corpus, it appearing that the offence charged against him had not resulted in any injury to person or property. In other words, it did not appear to the court that the commission of a minor technical offence against the State justified the State in depriving the United States for sixty days of the services of one of its soldiers.

<sup>20</sup> 119 Fed. Rep. 231.

In *Tarble's case*,<sup>21</sup> decided in 1872, was examined the right of a State court to inquire by writ of habeas corpus whether an individual was a member of the United States army and navy and, therefore, subject, as such, to Federal military law. The court denied this right, and asserted that this was a question exclusively for the Federal civil courts to determine.<sup>22</sup>

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<sup>21</sup> 13 Wall. 397.

<sup>22</sup> "The important question is presented by this case, whether a State court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that Government. For it is evident if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of the authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach the parties imprisoned under sentence of the National Courts, after regular indictment, trial and conviction, for offenses against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the National Court pronouncing sentence had jurisdiction to try and punish the offenders; but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction."

After referring to the position taken by the Supreme Court in *Ableman v. Booth* (21 How. 506) Justice Field continued:

"Among the powers assigned to the National Government, is the power 'to raise and support armies' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised; whether by voluntary enlistment or forced draft; the age at which the soldier shall be received, and the period for which he shall be taken; the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National Government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of habeas corpus, on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken

### § 1010. Courts-Martial.

The tribunals in which those who violate the military law are commonly tried (except where urgency demands a more summary method) are termed courts-martial. Article 64 of the Articles of War provides:

"The officers and soldiers of any troops, whether militia or others mustered and in pay of the United States, shall at all times and in all places be governed by the Articles of War and shall be subject to be tried by courts-martial."

General courts-martial consist of any number of officers from five to thir-

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from the army of the United States and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them and no movement could be made by the national troops without their commanders being subject to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the Government and easily persuaded to believe every step, taken for the enforcement of its authority, illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service in the hands of the parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National Government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldiers were discharged, the mischief would be accomplished. It is manifest that the powers of the National Government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty."

Chief Justice Chase, dissenting, said:

"I cannot concur in the opinion just read. I have no doubt of the right of a state court to inquire into the jurisdiction of a federal court upon habeas corpus, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry.

"I have still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The state court may err; and if it does, the error may be corrected here. The mode has been prescribed and should be followed.

"To deny the right of state courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed or the people who adopted the Constitution. That instrument expressly declares that 'the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.'"

teen, but not of less than thirteen except when to convene that number would be manifestly injurious to the service.<sup>23</sup>

Commissioned officers are triable only before these general courts-martial, and, when it can be avoided, the officers composing the court are not to be inferior in rank to the accused.

For the trial of enlisted men for certain offences summary courts, composed of one officer, appointed by the commanding officer, are provided.<sup>24</sup> There is also provision made for garrison courts-martial consisting of three officers for the trial of offences not capital.

These military tribunals are presided over, as said, by officers detailed for the purpose. No provision is made for either presentment or indictment by jury. The constitutionality of this is expressly provided for by the Fifth Amendment to the Constitution which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." There is no constitutional necessity for a trial jury in courts-martial for the reason that these courts are not parts of the Federal judicial system. Courts-martial are, in fact, agencies of the Executive.

The jurisdiction of courts-martial is essentially criminal, and, therefore, they may not try civil suits for the recovery of damages for injuries received.

The judgments of courts-martial are advisory in the sense that they do not become operative until approved by the superior authorities establishing them.

#### **§ 1011. Powers of Court-Martial; Jurisdiction of Civil Courts to Review Proceedings of.**

A leading case fixing the constitutional status of courts-martial is *Dynes v. Hoover*,<sup>25</sup> decided in 1858. This was an action of trespass and false imprisonment brought by the plaintiff, lately a seaman in the United States navy. The defendant pleaded that the imprisonment was by the authority of a naval general court-martial convened under an act of Congress. The plaintiff demurred to the plea on the ground that the court-martial had been without jurisdiction. Justice Wayne, delivering the opinion of the Supreme Court, after referring to the various constitutional provisions, said:

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power is given without any connection between it and the third article of the Constitution defining the judicial power of the United States, indeed, that the powers are entirely in-

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<sup>23</sup> Art. 75 of the Articles of War.

<sup>24</sup> Art. 79, Articles of War.

<sup>25</sup> 20 How. 65.

dependent of each other. . . . With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat if a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action of a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress."

From this decision it appears that, when acting within their jurisdiction, both as to the parties and to the subject-matter, courts-martial are not subject to the jury provision of the Constitution, nor are their decisions subject to review by the civil courts. In assuming jurisdiction, however, the courts-martial, in a sense, act at their peril, for their jurisdiction may be examined into by the civil courts, and if no jurisdiction is found, all acts committed by them are trespasses, punishment and damages for which the civil courts will award and the executive officers enforce.

#### **§ 1012. Jurisdiction of Courts-Martial over Offenses which are also Violations of the Local Civil Law.**

In *Coleman v. Tennessee* <sup>26</sup> the court said: "We do not call in question the correctness of the general doctrine . . . that the same act may, in some instances, be an offence against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee."

It is clear that there is here opportunity for conflict between the military and civil powers. Congress, however, has provided against these contingencies by giving the precedence, in such cases, in time of peace, to the civil courts.<sup>27</sup>

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<sup>26</sup> 97 U. S. 509.

<sup>27</sup> Article 74 of the Articles of War provides: "When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the

The 74th Article of War, the text of which has been quoted in the footnote, has been interpreted a number of times by the opinions of the Judge-Advocate-General of the United States, and the following principles laid down.

The Article includes offences committed by soldiers against municipal ordinances or by-laws. But it applies only to criminal charges. It does not extend to subpoenas summoning soldiers as witnesses in the civil courts though, as a matter of comity, commanding officers will always give their men permission to obey such mandates. It applies to offences against the laws of the States and not to those against the United States.

The Article refers only to soldiers within the immediate control of the military authorities. Soldiers absent on leave or furlough may be arrested like any other citizens. It does include, however, offences committed by soldiers before they came under the orders of the particular officer upon whom the demand by the civil authorities is made—even offences committed by the soldier before enlistment. It does not apply to civilians resident or employed upon military premises. These may be summarily seized by the civil authorities, though comity requires that even in such cases notice be given to the commanding officer.

The two classes of tribunals, civil and military, take care not to come into conflict in the performance of their duties. If an act committed by a soldier is an offence against both the civil and the military law, that authority which first assumes jurisdiction over him retains it until the end, and the other should await the results of its operations and judgment. Thus, the 74th Article does not, in general, require the surrender to the civil authorities of a soldier under confinement by order of a court-martial. Likewise a soldier released on bail by a civil court should not be tried by a court-martial unless this can be done and punishment inflicted in such a manner as not to interfere with the proceedings in the civil court. But when sentence is completed in one court, the prisoner is then liable in the other, and his former trial and conviction is no defence.

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laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial." See *Military Laws of the United States*, 6th ed. 1921, p. 1486.

During the World War, the War Department issued an instruction which read: "It is the policy of the War Department, under the 74th Article of War, to decline in time of war to turn over to the civil authorities one who is subject to military jurisdiction and charged with a civil offense except when the offense charged is a most serious one, such as common-law felonies, primarily against the civil community, which would serve to disqualify the offender for military service, and association with upright and honorable men, and where the commanding officer reasonably believes that the charge is not without proper foundation and that the accused will be accorded a fair trial without prejudice due to his military status."

Finally the 74th Article does not apply in time of war except in the discretion of the commanding officer upon whom demand is made. As a matter of fact, however, it may be noted that during the Spanish-American War, in 1898, an officer in the United States volunteers was actually given up to the civil authorities upon a charge of forgery.

**§ 1013. The Power of Congress to Vest in Military Tribunals Exclusive Jurisdiction over All Offences Committed by Military Persons, Including Offences Which Are also Crimes Against the Civil Law.**

There is an *obiter dictum* upon this point in *Coleman v. Tennessee*.<sup>28</sup> The point directly decided in that case was that a certain section (30) of the Enrollment Act had not, as a matter of fact, made the jurisdiction of the military tribunals over certain offences committed by soldiers in the army exclusive of the State courts. But, after deciding this in the negative, the court added: "We do not mean to intimate that it was not within the competence of Congress to confer exclusive jurisdiction upon military courts over offences committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution 'to raise and support armies' and to 'make rules for the government of the naval and land forces,' its control over the whole subject of the formation, organization and government of the national armies including therein the punishment of offences committed by persons in the military service, would seem to be plenary. All we now affirm is, that by the law to which we are referred, the 30th section of the Enrollment Act, no such exclusive jurisdiction is vested in the military tribunals." The court then went on to state that no reasons of public policy required such exclusive jurisdiction in the military tribunals, that such an interpretation of the Enrollment Act was not necessary for maintaining the efficiency of the army, since the courts could not take persons from the military service without the consent of the military authorities.

Some light is also thrown upon the subject by the case of *Ex parte Mason*,<sup>29</sup> decided in 1882. Mason was a sergeant of artillery in the army of the United States. While on guard duty at the United States jail in Washington, he wilfully and maliciously and with intent to kill, discharged his musket through a cell window at a prisoner in the jail. He was court-martialed and sentenced to be dishonorably discharged from the army, "and then to be confined at hard labor in such penitentiary as the proper authorities may direct for eight years." Mason petitioned for a writ of habeas corpus and certiorari. The Supreme Court doubted if it had jurisdiction to issue such a writ, "inasmuch as it has no power to review the judgments of courts-martial." "We all agree, however," the court continued, "that if a

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<sup>28</sup> 97 U. S. 509.

<sup>29</sup> 105 U. S. 696.



writ might issue there could be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court could, under the law, pronounce." Commenting upon the 59th Article of War,<sup>30</sup> the court said: "It is not pretended that any application was ever made under this article for the surrender of Mason to the civil authorities for trial. So far as appears, the person injured by the offense committed was satisfied to have the offender dealt with by the military tribunals. The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the military and the civil law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether after trial by the court-martial he can again be tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction."

The court then went on to hold that the court-martial had power to pass the sentence, citing the Article of War which provided that no court-martial shall sentence a person to imprisonment in the penitentiary unless by some statute law, State or Federal, or by the common law, in force where the offense was committed, the offender would have been subject to such imprisonment. The court continued: "When the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime and the trial is for that act. The proceedings are had in a court-martial because the offender is personally answerable to that jurisdiction. . . . The 62d article provides that the offender, when convicted, shall be punished at the discretion of the court, and the 97th article does no more than prohibit the court from sentencing to imprisonment in a penitentiary in cases where, if the trial had been had for the same act in the civil courts, that could not be done."

The question raised by the Supreme Court in this Mason case whether there might not be cases in which the correction and punishment at the hands of the military power of an offence which is also an offence against the local civil law might be a bar to further criminal proceedings in the civil courts, appears to the writer one which it was improper to raise in a speculative way, for the doctrine cannot be doubted that, so long as Congress has not made the military jurisdiction exclusive, the local civil courts have the right and authority to punish all violations of the laws which they are established to interpret and apply. It is true that this doctrine, as suggested in the Mason case, renders possible a second punishment where the first had

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<sup>30</sup> Now 74th Article of War.

been a sufficient vindication of the law, but courts, both military and civil, are to be presumed to strive to do substantial justice, and, therefore, they may be expected when called upon to impose a second penalty to consider the severity of the punishment already endured. As the Supreme Court has itself many times said, the mere possibility of a misuse of power is not a conclusive or even presumptive argument against its existence.

Whether or not, however, Congress has the constitutional power, except in time of war, to render the jurisdiction of military tribunals exclusive, as suggested *obiter* in *Coleman v. Tennessee*, would seem to be more doubtful; and when, if ever, that question is squarely presented to the Supreme Court, that tribunal may consider more carefully the possibility of the exaltation of the military over the civil authorities implicit in its *obiter dictum* in the *Coleman* case.

In *Grafton v. United States*,<sup>31</sup> it was held not only that an acquittal in a civil court could be pleaded in bar of a subsequent proceeding before a court-martial, but that an acquittal by a court-martial could be pleaded in bar to a subsequent criminal trial in a civil court of the same government for the same act viewed as an offence against the civil criminal law. It is to be noted that the qualification "of the same government" is here made, and that, therefore, the doctrine would not apply as between trials in courts of States of the Union and courts-martial of the United States.<sup>32</sup> The court said: "It is attempted to meet this view [of double jeopardy] by the suggestion that Grafton committed two distinct offenses,—one against military law and discipline, the other against the civil law. . . . We cannot assent to this view."

In *Caldwell v. Parker*<sup>33</sup> it was held that Article 92 of the Articles of War of 1916 which provided for the punishment of murder or rape as a court-martial might direct, but which, by Article 93, prohibited the trial by courts-martial in time of peace of murder or rape committed within the geographical limits of the States of the Union or the District of Columbia, and provided (Article 74) that military authorities should deliver to the civil authorities persons thus accused, did not operate to give to military courts exclusive jurisdiction in time of war of offences committed by persons in the military service in violation of State laws. The court, after quoting these Articles of War, said: "Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of the argument that authority existed under the Constitution to do so, to bring

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<sup>31</sup> 206 U. S. 333.

<sup>32</sup> In the *Grafton* case the plaintiff in error had been acquitted by a court-martial of the crime of homicide as defined by the Penal Code of the Philippines, and the attempt made thereafter to try him for the same offence in a civil court of the Philippines.

<sup>33</sup> 252 U. S. 376.

about, as the mere result of a declaration of war, the complete destruction of State authority and the extraordinary extension of military power upon which the argument rests. . . . Even though it be conceded that the purpose of Congress by the Articles of 1916, departing from everything which had gone before, was to give to military courts, as the mere result of a state of war, the power to punish as military offenses the crimes specified when committed by those in the military service, such admission is here negligible because, in that view, the regulations relied upon would do no more than extend the military authority, because of the state of war, to the punishment, as military crimes, of acts criminal under the State law, without the slightest indication of purpose to exclude the jurisdiction of State courts to deal with such acts as offenses against the State law."

#### § 1014. Military Tribunals and Civilians.

A reading of the relevant constitutional provisions shows that, while the powers of military tribunals are limited to cases arising out of operations of the land or naval forces, or of the militia when in actual service in times of war or public danger, the jurisdiction of these tribunals is not wholly restricted to persons in the military or naval forces of the United States, or to members of the militia when called into actual service. Thus, we find that Congress in its Articles of War has declared subject to military law and trial by military tribunals various classes of civilians. For example, one Article of War declares that "Whoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other things, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct."

The jurisdiction thus conferred would seem to be broader than that constitutionally justified by the doctrine declared in *Ex parte Milligan* <sup>34</sup> unless it be interpreted to apply only in time of war and within the actual theatre of military operations. In fact, it would appear to be so limited in the eyes of the military authorities, for, in the *Manual of Courts-Martial* of the United States Army, we find it so declared. <sup>35</sup>

The 82d Article of War declares: "Any person who, in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

Whether or not Congress intended by the use of the words "or elsewhere" to make subject to trial by military tribunals persons spying

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<sup>34</sup> 4 Wall. 2.

<sup>35</sup> P. 388.

outside of the theatre of actual military operations is not certain. If it did so intend, the law, as thus applied, would probably be held unconstitutional under the doctrine of the Milligan case. For a similar reason the constitutionality of the laws conferring on courts-martial jurisdiction over inmates of the National Home for Disabled Volunteer Soldiers,<sup>36</sup> over persons admitted to treatment in the General Hospital at Fort Bayard, New Mexico,<sup>37</sup> and to the Army and Navy General Hospital at Hot Springs, Arkansas,<sup>38</sup> would, if tested, be probably held unconstitutional.

It has been held that a member of the militia who neglects, when ordered to do so by Federal law, to present himself for mustering into the United States Army, has been held triable by a court-martial, although, of course, he has not, technically, become a member of the army.<sup>39</sup>

With regard to the jurisdiction of courts-martial of the National Guard, when not in the service of the United States, the National Defence Act of June 3, 1916,<sup>40</sup> provides that they shall have "cognizance of the same subjects and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the army of the United States." It would seem that the constitutionality of this provision is dependent upon a very broad construction of the term "disciplining" as used in the constitutional grant to Congress of the power to provide for "disciplining the militia, and for governing such part of them as may be employed in the service of the United States"; or upon a holding that the National Guard even when not in the active service of the United States is, under the National Defence Act, an integral part of the Army of the United States.<sup>41</sup>

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<sup>36</sup> Rev. St. 438.

<sup>37</sup> 34 Stat. L. 255.

<sup>38</sup> 35 Stat. at L. 748.

<sup>39</sup> *Martin v. Mott* (12 Wh. 19), upon authority of *Houston v. Moore* (5 Wh. 1). It may be observed that, under the National Defence Act of June 3, 1916 (39 Stat. at L. 208), as amended by act of June 4, 1920 (41 Stat. at L. 759) a National Guardsman is required to take a Federal oath at the time of his enlistment and that he then becomes a member of the Federal military forces, and subject as such to military law from the time that he is drafted or ordered into active service.

<sup>40</sup> 37 Stat. at L. 161. Amended, April 17, 1918, 40 Stat. at L. 531.

<sup>41</sup> As to this, see the excellent article by Major L. K. Underhill entitled "Jurisdiction of Military Tribunals in the United States over Civilians," in the *California Law Review*, January, 1924 (Vol. XII, pp. 75-98). Major Hill says: "But 'disciplining' here means system of drill (27 Cyc. 496), and except when the militia are in Federal service the whole government of the militia is in the province of the State (*People v. Hill*, 13 N. Y. Supp. 637; 126 N. Y. 497). The National Guard is part of the militia except when drafted into Federal service under authority of Congress and discharged from the militia (Act of June 3, 1916, as amended by Act of June 4, 1920). It is not in Federal service unless so drafted, or unless called into Federal service by the President to repel invasion, suppress insurrection, or enforce the laws of the Union. Even at a manœuvre

The plenary power of Congress to subject enemy aliens to trial by military tribunals has not been doubted since Marshall, in the early case of *Brown v. United States* <sup>42</sup> declared as conceded that "war gives to the sovereign full right to take the person and confiscate the property of the enemy wherever found."

#### § 1015. Powers of Military Tribunals in Times of War.

In time of war, and especially upon the actual theatre of war, military courts have, without express legislative authorization, exclusive jurisdiction over the members of the military forces. As the court said in *Coleman v. Tennessee*: <sup>43</sup> "In denying to the military tribunals exclusive jurisdiction under the section of the law of Congress in question, over the offenses mentioned, when committed by persons in the military service of the United States and subject to the Articles of War, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal Government, in which the supremacy of that Government was recognized, and the civil courts were open and in the undisputed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words, when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws as enforced by its armies could they be punished."

#### § 1016. The Organization and Disciplining of the Militia.

The "organizing, arming and disciplining of the militia," and the prescribing of the discipline for training them is expressly placed within the control of Congress. The actual training, however, of the militia, according to the discipline thus to be supplied by Congress, is kept within the hands of the State authorities. And, furthermore, to them is given in general the appointment of militia officers, and the entire government of the militia forces except when they have been called into the service of the General Government.

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camp for peace time training under Federal law the militia is not in Federal service (Digest Opinions Judge Advocate General, 1912, p. 704)."

See also this article for a discussion of the constitutional power of the States to provide for courts-martial in the militia.

<sup>42</sup> 8 Cr. 110.

<sup>43</sup> 97 U. S. 509.

The present Federal laws passed under the constitutional authority for "organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States, provide: "The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided,<sup>44</sup> not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia and the Unorganized Militia."<sup>45</sup>

### § 1017. The National Guard.

The National Guard is declared to consist of regularly enlisted men. The organization of the Guard is the same as that of the Regular Army, subject to such exceptions as the Secretary of War may authorize. The President may prescribe the particular unit or units, as to branches or arms of service, to be maintained in each State, Territory, or District of Columbia, "in order to secure a force which, when combined, shall form complete higher tactical units."

For the purpose of maintaining an appropriate organization and to assist in instruction and training, the President is authorized to detail officers either of the National Guard or of the Regular Army to command the divisions, brigades or other tactical units of the Guard; and, specifically, it is provided that the President may detail one officer of the Regular Army as Chief of Staff and one officer of the Regular Army or of the Guard as assistant to the Chief of Staff of any division of the Guard in the service of the United States as a National Guard organization. In each State, Territory and the District of Columbia there is appointed by the President an Adjutant General, who is required to make annual and other reports to the Secretary of War or such other officers as the President may designate, and in the forms prescribed. Annual inspections of the Guard by officers of the Regular Army are made. Appropriations are made for the support of the

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<sup>44</sup> The exceptions relate to judicial and executive officers of the Government of the United States and of the several States and Territories, to persons in the military and naval services of the United States, to persons employed in the customs and postal services of the United States, to persons employed in armories, arsenals, and navy yards of the United States, to mariners, etc. Also exempted from combatant militia service, without regard to age, are "all persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief by such persons shall be established under such regulations as the President shall prescribe . . . but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant."

<sup>45</sup> Act of June 3, 1916 (39 Stat. at L. 197), amended by Act of February 28, 1925, 43 Stat. at L. 1075.

Guard, including the expense of providing arms, ordnance stores, quartermaster stores and camp equipage and other military supplies, etc.

It is provided that the Guard shall "so far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipment as are or shall be provided for the Regular Army." Also, that the discipline and training of the Guard shall be the same.

#### **§ 1018. Call or Draft of the National Guard into Federal Service.**

It is provided by the act of June 4, 1920,<sup>46</sup> that: "When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examinations as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war or emergency, unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve.<sup>47</sup> All persons so drafted shall from the date of their draft, stand discharged from the militia, and shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army, whose permanent service is not contemplated by law, and shall be organized into units corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct."

Provision is made by congressional statute for systems of courts-martial—general, special and summary—for the National Guard. These courts are constituted in a manner similar to that of the courts-martial of the Regular Army, and possess similar powers.

The enlisted strength of the National Guard is provided for by statute.<sup>48</sup>

#### **§ 1019. National Guard Reserve.**

Provision is made by congressional statute for a National Guard Reserve in each State, Territory and the District of Columbia which consists of "such organizations, officers, and enlisted men as the President may prescribe, or members thereof may be assigned as reserves to an active organization of the National Guard."<sup>49</sup>

#### **§ 1020. Reserve Naval Forces and Naval Militia.**

Provision has been made for a Naval Reserve, which is declared to be a component part of the United States Navy, and which consists of the Fleet Naval Reserve, the Marine Naval Reserve, and the Volunteer Naval

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<sup>46</sup> 41 Stat. at L. 784.

<sup>47</sup> As to the National Guard Reserve, see § 1019.

<sup>48</sup> Act of June 3, 1916, 39 Stat. at L. 198.

<sup>49</sup> Act of June 3, 1916, 39 Stat. at L. 202, amended by Act of February 28, 1925, 43 Stat. at L. 1073.

Reserve. There is also a Marine Corps Reserve, consisting of the Fleet Marine Corps Reserve and the Volunteer Marine Corps Reserve, corresponding as near as may be to the Fleet Naval Reserve and the Volunteer Naval Reserve.<sup>50</sup>

There is also a Naval Militia. The Act of February 28, 1925,<sup>51</sup> provides: "Of the Organized Militia, as provided by law, such part as may be duly prescribed in any State, Territory, or the District of Columbia shall constitute a Naval Militia. . . . That such vessels, material, armament, equipment, and other facilities of the regular Navy as are or may be made available for the Fleet Naval Reserve shall also be made available, in the discretion of the Secretary of the Navy, for issue or loan to the several States, Territories, or the District of Columbia, for the administration and training of units of the Naval Militia, but no such facilities of the regular Navy shall be furnished for use by any portion or unit of the Naval Militia unless at least ninety-five per centum of its personnel has been appointed or enlisted in the Fleet Naval Reserve and unless its organization, administration, and training conform to the standard prescribed by the Secretary of the Navy for such units."

#### § 1021. The Militia as an Arm of the Federal Government.

The Constitution enumerates three purposes for aid in the effectuation of which the United States militia forces may be mandatorily called upon by the General Government. These are (1) to execute the laws of the Union, (2) to suppress insurrections, (3) to repel invasions.

The suppression of insurrections has been held to include the waging of civil war for the putting down of rebellion,<sup>52</sup> and the repelling of invasions to include the providing against an attempted or threatened invasion.<sup>53</sup> The President may, when calling upon the militia, apply to the governors of the States to give the necessary orders, or may issue his orders directly to the commanding officers of the militia.<sup>54</sup> When called into the Federal service, the militia comes under the same complete Federal control as the regular national forces, and is subject to the Rules and Articles of War.<sup>55</sup>

In *Martin v. Mott*<sup>56</sup> the doctrine was declared, which has not since been questioned, that the President is given by the Constitution the sole and exclusive power to judge as to whether an exigency has arisen calling for a use of the militia by the Federal authorities.<sup>57</sup>

<sup>50</sup> Act of February 28, 1925, 43 Stat. at L. 1080.

<sup>51</sup> Section 28.

<sup>52</sup> *Texas v. White* (7 Wall. 700); *Tyler v. Defrees* (11 Wall. 331).

<sup>53</sup> *Martin v. Mott* (12 Wheat. 19).

<sup>54</sup> *Houston v. Moore* (5 Wh. 1).

<sup>55</sup> *Houston v. Moore* (5 Wh. 1).

<sup>56</sup> 12 Wh. 19.

<sup>57</sup> In this case the court said:

"Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders



When called into Federal service, the statutes provide that the National Guard shall be subject to the laws and regulations governing the Regular Army so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active or retired list, is contemplated by existing law.<sup>58</sup>

The purposes for which the State militia forces may be used by the Federal Government are enumerated by the Constitution. There is ground, therefore, for saying that the militia may not be sent outside of the United States except in so far as this may be necessary to accomplish the purposes thus specified. It is clear, however, that this limitation does not apply when the militia is drafted into and made a part of the Regular Army of the United States.

### **§ 1022. The Use of the Militia and Federal Troops to Suppress Domestic Disorder.**

From the foregoing it is seen that in all cases in which the integrity or existence of the National Government is attacked or threatened, or a resistance is offered to the execution of its laws too great to be overcome by the ordinary agencies of government, the aid of the Federal troops or of the organized militia of the States may be at once called upon. In cases, however, of domestic violence within a State, directed against its laws and government, the Federal arm may extend help only when called upon by the State authorities.

In 1894 at the time of the great railroad strike of that year, the employment in Illinois of Federal troops, there having been no request for their use by the authorities of that State, gave rise to a vehement protest on the part of the governor of the State. It would appear, however, that the action of the Federal authorities in that instance was fully justified, the Federal troops being avowedly and in fact employed "to prevent ob-

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of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress."

It is also provided by act of Congress that "Whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable, with the other forces at his command, to execute the laws of the Union in any part thereof, it shall be lawful for the President to call forth, for a period not exceeding nine months, such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose to such officers of the militia as he may think proper." Act of January 21, 1903, 32 Stat. at L.

struction to the Federal postal service, to aid the Federal courts in the exercise of their jurisdiction, and to enforce the law of July 2, 1890, forbidding conspiracies against interstate commerce.”<sup>59</sup>

In *re Debs*,<sup>60</sup> decided in 1895, the Supreme Court upheld the action of the Federal authorities in 1894, and, in the course of the opinion said:

“The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the Nation to compel obedience to its laws.”

The court also went on to assert that “the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention.”<sup>61</sup>

### § 1023. Conscription.

It will have appeared from the accounts which have been given of the Militia law that Congress has declared the obligation of every able-bodied

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<sup>59</sup> 26 Stat. at L. 109, § 1. “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”

§ 4. “The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several District Attorneys of the United States under direction of the Attorney-General to institute proceedings in equity to prevent or restrain such violations.

To the protest which Governor Altgeld of Illinois issued, President Cleveland replied:

“Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the United States, upon the demand of the Post-Office Department that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that process of the Federal Courts could not be executed through the ordinary means, and upon abundant proof that conspiracies existed against commerce between the States.

“To meet these conditions, which are clearly within the province of Federal authority, the presence of Federal troops in the city of Chicago was deemed not only proper but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city.”

<sup>60</sup> 158 U. S. 564.

<sup>61</sup> In this Chicago Railway Strike episode, as Professor Fairlie remarks in his *National Administration*, p. 38, the only novel feature was the use of the army for the enforcement of the comparatively recent statute prohibiting conspiracies against interstate commerce, and in the broader interpretation given to what constitutes an obstruction of the postal service. Before this when strikers had cut out passenger and baggage cars from a train leaving the mail cars undisturbed, it had been held that the mails were not interfered with. But in this case it was held that such an act did amount to an obstruction of the postal service.

For a detailed history of the instances in which Federal aid has been extended in quelling domestic disturbances, see Senate Document No. 209, 57th Congress, 2d Session.

male citizen, and of aliens who have declared their intention to become citizens, of the ages designated, to serve in the militia of the United States, and that the "organized" portions thereof, termed the National Guard, may be drafted and incorporated in the Regular Army of the United States. The National Guard, however, consists of only those members of the militia who have voluntarily enlisted therein, and thus received the benefit of the training and appropriations for equipment provided by the Federal Government.

However, it is not open to doubt that the United States has the constitutional power to compel military service, that is, by drafting into its military services (army, navy, aviation, etc.), all or any selected part of its citizens.<sup>62</sup> This proposition, if it could be said to have been in doubt as late as 1917, was conclusively settled by the Supreme Court in *Arver v. United States*<sup>63</sup> in which was upheld the constitutionality of the act of Congress of May 18, 1917,<sup>64</sup> commonly known as the "Selective Draft Law." In its opinion in this case the court went on to develop at some length the rational foundation upon which this right of a state to command the military services of its citizens is based and to point to the fact that this right is recognized in practically all, and perhaps all, sovereign states. This argument, because of its length, it is not practical to reproduce, but the following sentence may be quoted: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." The court also went on to emphasize that the constitutional provisions regarding the militia are to be sharply distinguished from those which confer upon Congress the power to raise armies, and, therefore, the fact that certain limitations are imposed by the Constitution upon the use of the militia for Federal purposes does not operate, argumentatively, to limit the power of the United States to raise and employ armies.<sup>65</sup>

#### § 1024. Declarant Aliens under the Selective Draft Act.

The inclusion, by the act of May 18, 1917, of declarant aliens among persons subject to the draft gives rise to no constitutional question. Its propriety can be questioned by other States in behalf of their own citizens thus included only as being in violation of treaties which such nations may have with the United States or as being in violation of accepted

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<sup>62</sup> As to resident aliens, see *post*.

<sup>63</sup> 245 U. S. 366. See also *O'Connell v. United States* (253 U. S. 142).

<sup>64</sup> 40 Stat. at L. 76. See also the act of February 28, 1919, 40 Stat. at L. 1211.

<sup>65</sup> The course of earlier legislation, and especially the draft laws during the Civil War, is also traced; and attention is directed to the fact that the draft law of March 3, 1863 (12 Stat. at L. 731), was upheld in a case which was identical in character with the instant case. *Kneedler v. Lane* (45 Pa. 238).

doctrines of international law and practice. Such protests on the part of other States cannot be made to the courts, but will have to be addressed to the Department of State, and, through it, to the President. As a matter of practice, it has been usual for the United States to exempt aliens, whether they have previously declared an intention to seek citizenship or not, upon request of the aliens' home countries. But whether there exists, under international law, an obligation so to do, is by no means clear.<sup>66</sup> It is certain, however, that international law would not sanction the compelling of an alien to fight against his own country.

### § 1025. Drafting of Non-Combatants and of Property.

There has been some discussion as to the desirability in a future war, should one come, of drafting into the National service not only persons for direct military service, but also persons for carrying on those industries of the country whose products, whether of food, clothing, or other material, are needed either for the maintenance of the military and civil branches of the government, and also the whole body of citizens upon whom, in the last resort, the Government must depend for the successful prosecution of the war. It would seem, from the doctrines which have been already established, and which have been discussed in the preceding sections, that Congress may constitutionally do this. It is true that, in the past, States have seldom drafted persons except for military duty, but, looking at the matter in a reasonable way, it would seem less drastic for a State to require of its citizens their labor or their properties in its fields of production or of non-military personal services than to require them to render military service with its accompanying risks to life and limb. There is this difference that the rendition of military service is clearly a means of carrying on the war, whereas, this is not obvious in the case of non-military services. However, where it is shown, as a matter of fact, that there is a reasonable relation between such compulsory non-military service and the successful prosecution of the war, a constitutional justification for it could be found in the war powers of Congress.<sup>67</sup>

### § 1026. Declaration of War.

To Congress is expressly granted by the Constitution the power to declare war. This has been construed to include the right to declare that a state of war has been created by the act or acts of foreign powers hostile to the United States, and, in fact, in the foreign wars in which the United States has been involved, the declaration of Congress has taken this form.

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<sup>66</sup> For a collection of authorities see H. R. Rpt. 115, 65th Cong., 1st Sess.

<sup>67</sup> Upon this subject see the interesting article by W. F. Keefer "Has a Person the Constitutional Right to Abstain from Work?" in 29 *West Virginia Law Quarterly*, 20. Cf. *Block v. Hirst* (256 U. S. 135).

Furthermore, these declarations have been made upon the recommendation of the President, though there is no question but that Congress may take the initiative in recognizing a state of war as existing.

It is also to be noted that the powers constitutionally vested in the President with regard to the control of the foreign relations of the United States makes it possible for him to bring about a situation in which, as a practical proposition, there is little option left to Congress as to whether it will or will not declare war or recognize a state of war as existing.

#### § 1027. War May Exist without Congressional Declaration or Recognition.

War may come into existence as a fact without a formal declaration. In the *Prize cases* <sup>68</sup> the Supreme Court has held that this existence of war as a fact may be recognized by the President, in advance of congressional declaration, and that he may thereupon take action, as, for example, the establishment of a blockade, which in time of peace he would not be constitutionally empowered to institute. After defining war in a public sense and asserting that a civil strife may become a public war by reason of numbers, powers and organization of the persons who originate and carry it on, the court in those cases said: "Whether the President, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and the court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." <sup>69</sup>

The first establishment of the blockade by the President was on April 19, 1861. July 13 of the same year Congress by act formally declared war to exist, and validated retroactively the acts of the President prior to that date.

In the case of *The Protector* <sup>70</sup> the court held that the war had begun at the times of the President's two proclamations of blockade, April 19 and 27, 1861, but that it had closed at different dates in the different States. Thus in some of the States it was declared not to have ended

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<sup>68</sup> 2 Black, 635.

<sup>69</sup> In a dissenting opinion Justice Nelson, while granting that a civil strife might become a public war, with the parties thereto belligerents, declared that this change of status could not be brought about save by the formal action of Congress, the body which by the Constitution is authorized to declare war.

<sup>70</sup> 12 Wall. 700.

until August 20, 1866, or about a year after active military operations had come to an end. The court in *The Protector* case said: "The question in the present case is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the Statute of Limitations by the war of rebellion?

"Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

"The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed as marking the second. But the war did not begin or close at the same time in all the States. There were two proclamations of intended blockade; the first of the 19th of April, 1861, embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second of the 27th of April, 1861, embracing the States of Virginia and North Carolina; and there were two proclamations declaring that the war had closed: one issued on the 2d of April, 1866, embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the other issued on the 20th of August, 1866, embracing the State of Texas."

To the writer it seems to have been a very questionable construction of the Constitution to hold that, in the case of a civil struggle, the President has the power, upon his own judgment, to affix to it the character of a public war, and thus to bring into existence all the many legal conditions which that status imports. That he should have full power to use all the forces of the nation to put down resistance to the execution of the Federal laws there can be no question, but it would seem that the explicit declaration of the Constitution that to Congress belongs the power to declare war necessarily excludes from the executive sphere of authority the power to pronounce that public war exists. The author is, therefore, disposed to quote with approval the following language of Justice Nelson employed in his dissenting opinion in the *Prize* cases. When public war exists, he says: "The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemy's property, the drawing of bills of exchange or purchase on the

enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land (*Brown v. United States*, 8 Cr. 110). All treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, *jure belli*. War also effects a change in the mutual relations of all States or countries, not directly, as in the case of belligerents, but immediately and indirectly, though they have no part in the contest but remain neutral. This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war; and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State. This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country. By our Constitution, the power is lodged in Congress."

That no war can exist between the United States and a foreign State, except by the declaration of Congress, there has never been any doubt. This declaration may, however, be that a state of war exists, or one declaring that war shall be begun. The terms of such a declaration fix the exact date of the beginning of the war so far as concerns matters of municipal law, and are binding on the courts of the State issuing it. From the viewpoint, however, of other nations, such a declaration is not conclusive, the beginning of the war being a question of fact to be interpreted in the light of the general principles of international law.<sup>71</sup>

### § 1028. Imperfect, Partial or Limited War.

It appears that there is recognized by law a status known as "Imperfect War," although just what legal consequences result therefrom, or just what conditions create it, it is difficult to say, the relevant cases being very few.

In *Bas v. Tingy*<sup>72</sup> was involved an American ship which had been captured by a French privateer in 1799, recaptured by a public armed Ameri-

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<sup>71</sup> Upon this point see the very thoughtful paper of T. S. Woolsey entitled "The Beginnings of War," published in Vol. I, p. 54, of the *Proceedings of the American Political Science Association*.

<sup>72</sup> 4 Dall. 37.

can ship, and condemned to pay salvage under an act of Congress of March 2, 1799. Upon appeal to the Supreme Court, it was held that, at the time of the capture and recapture, limited hostilities existed between France and the United States which had been authorized by the two governments, and which justified the legislation in question. The public war, which, though not formally declared or recognized by the two governments, nevertheless existed, Justice Washington, in his opinion declared to be not a general, but a "limited" or "imperfect" one. He said: "It may, I believe, be safely laid down, that every contention by force between nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is a public war, because it is external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power."

This was the condition which the court declared to have existed between France and the United States in 1799.

In this same case, Justice Chase, in his opinion, declared: "Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws. What then is the nature of the contest subsisting between America and France? In my judgment it is a limited, partial, war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels, lying in a French port; and the authority is not given indiscriminately, to every citizen of America, against every citizen of France, but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates."



In *Gray v. United States*,<sup>73</sup> decided in 1886, the Court of Claims quoted with approval the words of Justice Washington which have been quoted above, and, after referring to the character of the legislation of Congress at the time, said: "This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war (in the full or perfect sense) did not in fact exist. . . . We are, therefore, of opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals."

### § 1029. The Termination of War.

The termination of the legal status of war is to be distinguished from the cessation of hostilities in the field. There is no question that the President, as Commander-in-Chief of the armed forces of the Nation, may direct a discontinuance of active hostilities, that is, of military operations, but, when he does so, this does not bring the war to an end as a legal situation. In *Hijo v. United States*<sup>74</sup> the court, with reference to the Spanish-American War, pointed out that the war could not be said to have terminated by reason of the protocol of August 12, 1898, issued by the President, and by his proclamation of the same date, and that such termination did not occur until the ratification of the treaty of peace in April of the next year.

As is well known, in the case of the World War armistices were signed on November 11, 1918, but treaties of peace were not ratified until August 1, 1921, with Germany, and August 24, 1921, with Austria. Nevertheless, prior to these latter dates commercial relations with Germany had, to a certain extent, been resumed, and on November 11, 1918, when President Wilson transmitted to Congress the terms of the armistices which had been entered into, he had declared that "the war thus comes to an end, for, having accepted these terms of the armistice, it will be impossible for the German command to renew it."

It is clear, however, that neither the President nor Congress regarded the war as legally terminated by the armistice, for, subsequent to its date, Congress passed and the President approved, acts based upon the assumption that a state of war still continued. Such was the War Time Prohibition Act of November 21, 1918<sup>75</sup> which in its text referred to the war as still continuing.

Construing this act in *Hamilton v. Kentucky Distilleries and Warehouse Co.*<sup>76</sup> the court, referring to the contention that the war had terminated at the time of the accruing of the instant cause of action, said: "In the absence of specific provisions to the contrary the period of war has been held to ex-

<sup>73</sup> 21 Ct. Cl. 340.

<sup>74</sup> 194 U. S. 315.

<sup>75</sup> 40 Stat. at L. 1045.

<sup>76</sup> 251 U. S. 146.

tend to the ratification of the Treaty of Peace or the proclamation of peace.”<sup>77</sup> With regard to the meaning to be given to the words “conclusion of war,” as used in the act, the court said: “‘Conclusion of the war’ clearly did not mean cessation of hostilities; because the act was approved ten days after hostilities had ceased after the signing of the armistice. Nor may we assume that Congress intended by the phrase to designate the date when the Treaty of Peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate. Furthermore, to construe ‘conclusion of war’ as meaning the actual termination of war activities would leave wholly uncertain the date when the act would cease to be operative.”

While it clearly appears from the foregoing declarations of the court that a war to which the United States is a party is not brought to a legal end by a mere cessation of hostilities, whether marked by a formal armistice or otherwise, it does not clearly appear whether the formal act which does bring the status of war to an end, so far as the United States is concerned, may not be by congressional or presidential action as well as by the ratification of a treaty of peace. Indeed, in the case of the Civil War of 1861-1865, it was not possible to terminate it by a treaty of peace, since there was no recognized government or State with which a treaty could be entered into; and the same might be true in the case of a war with a foreign power in which that power might be so entirely destroyed, and its people and territory so drawn under the United States sovereignty as to leave existing no political entity or person with which, or with whom, a treaty of peace could be negotiated. In such cases it does not appear to have been clearly determined whether the termination of the status of war should be by presidential proclamation or by congressional resolution or declaration.

As regards the Civil War, the declarations of the Supreme Court seem to hold that its termination resulted from presidential declarations. In *United States v. Anderson*,<sup>78</sup> it was held that, as regarded the application of the Captured and Abandoned Property Act the war was to be held as terminated on August 20, 1866, when the President, after reciting certain proclamations and acts of Congress concerning the war, proclaimed that the war had ceased in Texas. (Prior to then, by a Proclamation of April 2, 1866, he had declared that armed resistance had ceased everywhere except in Texas.) “This,” said the court, “is the first official declaration that we have on the part of the Executive, that the rebellion was wholly suppressed.” “But,” the court went on to say, “we are not without the action of the legislative Department of the Government on this subject. On the 20th day of June, 1864 (13 Stat. at L. 144), Congress

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<sup>77</sup> Citing *Hijo v. United States* (194 U. S. 315); *The Protector* (12 Wall. 700); and *United States v. Anderson* (9 Wall. 56).

<sup>78</sup> 9 Wall. 56.

fixed the pay of non-commissioned officers and privates, and declared that it should continue during the rebellion; and on the 2d day of March, 1867 (14 Stat. at L. 421), it continued this Act in force for three years from and after the close of the rebellion, as announced by the Proclamation of the President. . . . As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question whenever private rights are affected by it."

It will be seen that, in this case, a question of statutory construction and application was involved, and the court approached the question of the date of the termination of the war rather as one of fact than as one of constitutional inquiry, and that, for the determination of this fact, it relied upon both presidential proclamations and congressional declarations, and gave no opinion as to which of these would have been held constitutionally decisive had there been a conflict between them.

However, in *Freeborn v. The Protector*,<sup>79</sup> the court was more explicit in its reliance upon presidential proclamations, both as regarded the beginning of the Civil War and its ending. In that case the court said: "Acts of hostility occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late Civil War, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the Executive Department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The Proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the Proclamation that the war had closed, as marking the second."<sup>80</sup>

Even in this case, it is seen that the court viewed the question as one of fact, and made no attempt to determine, as a matter of constitutional construction, where the power to terminate a war, in absence of a treaty, reposes. And that no final doctrine was declared, as between the executive and legislative departments of the government, would seem to be indicated by the concluding observation that: "In the absence of more certain *criteria*, of equally general application, we must take the dates of these

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<sup>79</sup> 12 Wall. 700.

<sup>80</sup> The court went on to say that, as regards both its beginning and its ending, the duration of the war did not exist during the same periods of time for all the States of the Union; for there were two Proclamations of intended blockade applying to different States, and two Proclamations regarding the termination of hostilities, also applying each to different localities.

Proclamations as ascertaining the commencement and the close of the war in the States mentioned by them."

It would seem to the author that, should it become necessary at some later time to decide specifically whether the constitutional power to terminate a war, which is not terminated by a treaty of peace, is vested in Congress or in the President, or in both, that it would be more reasonable to hold that the power is vested, and perhaps exclusively, in Congress, since, to that body being expressly given by the Constitution the power to declare war, it may be inferred that it was intended that it should have the right to annul the effect of the exercise of that power, that is, to bring to an end that condition or status which it has created.<sup>81</sup>

### § 1030. War Powers of the President.

The Constitution makes no specific provision for the exercise by the President of exceptional powers in time of war, but the fact is none the less true that, in time of war, he is enabled to exercise his specifically given powers more vigorously than in time of peace, and Congress is, as a matter of expediency, compelled to grant to him wide discretionary statutory powers.

The power of the President so to influence events as to make war practically inevitable is involved in the degree of constitutional power which he possesses to control the foreign relations of the United States. The power of the President to recognize a state of public war as existing, and to bring to an end such a status has already been discussed. Elsewhere, also, is discussed his power, in time of war, to suspend the writ of habeas corpus. The special and extraordinary powers which the President has exercised in times of war have been those given to him by statute, and thus raise questions as to the war powers of Congress rather than of the war powers of the President.<sup>82</sup>

### § 1031. Powers of the President as Commander-in-Chief of the Army and Navy.

The constitutional commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into

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<sup>81</sup> For an argument that Congress should be held to have this implied power even with respect to foreign war which might be terminated by treaties of peace, see the article of Professor E. S. Corwin, "The Power of Congress to Declare Peace," in 18 *Michigan Law Review*, 669.

See also, generally, with regard to the subject, the article by Professor J. M. Mathews, "The Termination of War" in 19 *Michigan Law Review*, 819, and that by F. R. Black, "The Termination of Hostilities" in 62 *American Law Review*, 248.

<sup>82</sup> For an elaborate and able statement of the so-called war powers of the President see C. A. Berdahl's *War Powers of the Executive in the United States*, Univ. of Illinois Studies in the Social Sciences, Vol. IX, 1920.

the service of the United States, is the President.<sup>83</sup> Through, or under, his orders, therefore, all military operations in times of peace, as well as of war, are conducted. He has within his control the disposition of troops, the direction of vessels of war and the planning and execution of campaigns. With Congress, however, lies the authority to lay down the rules governing the organization and maintenance of the military forces, the determination of their number, the fixing of the manner in which they shall be armed and equipped, the establishment of forts, hospitals, arsenals, etc., and, of course, the voting of appropriations for all military purposes.<sup>84</sup>

With respect to many matters of detail Congress has delegated to the President and to his executive subordinates the promulgation of administrative orders for the government of the land and naval forces which it might constitutionally itself provide, but which in fact it is either impossible or unwise for it to attempt to do. All orders of the President, or of the Secretary of War issued under his authority, whether given by virtue of his constitutional office as commander-in-chief or of his statutory powers, have the full force of law.<sup>85</sup> But in all cases these orders must, if issued by virtue of authority congressionally given, pursue the terms of the granting statute; and, if issued by virtue of his constitutional authority, be in accordance with the generally accepted principles of international law and custom. Where this is not done, they will not justify the acts of subordinates acting under them.<sup>86</sup>

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<sup>83</sup> Art. II, Sec. II, Cl. 1.

<sup>84</sup> The distinction between congressional and presidential powers in military matters is drawn by the Supreme Court in *Ex parte Milligan* (4 Wall. 2), in the following words:

"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

"The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of officials, either soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."

<sup>85</sup> *United States v. Freeman* (3 How. 556); *Smith v. Whitney* (116 U. S. 167).

<sup>86</sup> *Little v. Barreme* (2 Cr. 170).

**§ 1032. Right of the President to Send Troops outside the United States in Time of Peace.**

There has been no question as to the constitutional power of the President of the United States, in time of war, to send troops outside of the United States when the military exigencies of the war so require. This he can do as commander-in-chief of the Army and Navy, and his discretion in this respect can probably not be controlled or limited by Congress.

As to his constitutional power to send United States forces outside the country in time of peace when this is deemed by him necessary or expedient as a means of preserving or advancing the foreign interests or relations of the United States, there would seem to be equally little doubt, although it has been contended by some that the exercise of this discretion can be limited by congressional statute. That Congress has this right to limit or to forbid the sending of United States forces outside of the country in time of peace has been asserted by so eminent an authority as Ex-Secretary Root.<sup>87</sup> It would seem to the author, however, that the President, under his powers as Commander-in-Chief of the Army and Navy, and his general control of the foreign relations of the United States, has this discretionary right constitutionally vested in him, and, therefore, not subject to congressional control. Especially, since the argument of the court in *Myers v. United States*<sup>88</sup> with reference to the general character of the executive power vested in the President, and, apparently, the authority impliedly vested in him by reason of his obligation to take care that the laws be faithfully executed, it is reasonable to predict that, should the question be presented to it, the Supreme Court will so hold. Of course, if this sending is in pursuance of express provisions of a treaty, or for the execution of treaty provisions, the sending could not reasonably be subject to constitutional objection.

Congress has not seen fit expressly to authorize or to attempt to control the sending by the President of the United States forces outside the country, and, in fact, without deeming it necessary to obtain congressional consent, the President has frequently done this.

In 1900, during the Boxer troubles in China, United States troops participated in active and hostile military operations against the Chinese upon a considerable scale, but war between the United States and China was not recognized to exist. So also, war was not recognized to exist when United States troops were sent into Mexico by President Wilson.

American troops participated in the Allied military operations at and near Archangel against certain bodies of Russian troops. At this time the United States was at war with Germany and Austria, but not with Russia. The Archangel undertaking was, however, an integral part of

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<sup>87</sup> *Colonial and Military Policy of the United States*, 157. Cited by Berdahl, *War Powers of the Executive of the United States*, 121.

<sup>88</sup> 272 U. S. 52.

the general military operations carried on by the Allied and Associated Powers. Similar was the character of the military operations in Eastern Siberia in which American troops participated. However, these Siberian operations continued for a considerable time after the general armistice of November 11, 1918. In fact, the United States did not withdraw its troops from Siberia until the Spring of 1920.

United States troops, especially the Marine Corps, have frequently been sent to foreign countries in time of peace and have engaged there in active fighting for the attainment of specific and limited purposes, sometimes in pursuance of existing treaties and sometimes not.

At the outbreak of the Civil War President Lincoln, without waiting for any authorization from Congress, and under his avowed right as Commander-in-Chief of the Army and Navy, by proclamation provided for greatly increasing the size of the Regular Army and the Navy. There can be but little doubt that this was in excess of his constitutional powers. Indeed, President Lincoln hardly attempted to defend his acts upon legal grounds. In his message to Congress of July 4, 1861, he said of them: "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."<sup>89</sup>

President Wilson asserted that, although the United States was not at war, he had the constitutional right, without express constitutional authorization, to arm merchant vessels with defensive guns, but that he preferred to obtain that authorization.<sup>90</sup> The Congress refused to give this authorization, whereupon President Wilson proceeded, on the basis of his own authority, to equip merchant vessels with guns and gunners assigned to them from the Navy.

### § 1033. War Powers of Congress.

The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal. Indeed, the President in the exercise simply of his authority as commander-in-chief of the army and navy, may, unless prohibited by congressional statute, commit or authorize acts not warranted by commonly received principles of international law; and Congress may by law authorize measures which the courts must recognize as valid even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus during the Civil War in certain cases the

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<sup>89</sup> Congress promptly gave this ratification. 12 Stat. at L. 326.

<sup>90</sup> See his message to Congress of February 26, 1917.

provision by congressional statute for the confiscation of certain enemy property or land was enforced, though such confiscation was not in accordance with the general usage of foreign States.

Even in dealing with its own loyal subjects, the power to wage war enables the government to override in many particulars private rights which in time of peace are inviolable.

In *Miller v. United States*<sup>91</sup> the court had before it certain confiscation acts, enacted by Congress during the Civil War and with reference to the prosecution of that war. These acts, the majority of the court held valid as prescribing legitimate modes or means of carrying on the war. In the course of its opinion the court said: "Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." This language the court has repeated, in substance, in later cases.<sup>92</sup>

In *Littlejohn & Co. v. United States*,<sup>93</sup> to the contention that it was unconstitutional for Congress to provide, as it had provided by Joint Resolution of May 12, 1917,<sup>94</sup> for the seizure and confiscation of enemy ships in its harbors in time of war, because such seizure and confiscation was not warranted by generally recognized international law and practice, the court said: "It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs."<sup>95</sup>

In *Central Union Trust Co. v. Garvan*<sup>96</sup> the court assumed without argument the validity of the Trading with the Enemy Act of October 6, 1917,<sup>97</sup> providing for the seizure in war time of property supposed to belong to the enemy.

Other illustrations of war legislation by Congress during the World War were the regulation of the price of fuel, the enforcement of nation wide prohibition, the commandeering of ships, the commandeering of various factory products, and the taking over for operation by the government of the telegraph and railway lines of the country.<sup>98</sup>

<sup>91</sup> 11 Wall. 268.

<sup>92</sup> *Stewart v. Kahn* (11 Wall. 493); *Mechanics and Traders Bank v. Union Bank* (22 Wall. 276).

<sup>93</sup> 270 U. S. 215.

<sup>94</sup> 40 Stat. at L. 75.

<sup>95</sup> Citing *Brown v. United States* (8 Cr. 110). It may be said that, even had there been treaties *contra*, a later act or joint resolution of Congress would control the courts.

<sup>96</sup> 254 U. S. 554.

<sup>97</sup> 40 Stat. at L. 411.

<sup>98</sup> For cases sustaining this legislation, see *Northern Pacific R. Co. v. N. Dakota* (250 U. S. 135); *Dakota Central Tel. Co. v. S. Dakota* (250 U. S. 163); *The Lake Monroe* (250 U. S. 246); and *Hamilton v. Kentucky Distilleries Co.* (251 U. S. 146). In general, in these cases, the constitutionality of the acts of Congress as war measures was taken for granted without argument.



While, in general, it may be said that, in time of war, Congress has a practically unfettered constitutional discretion as to the means it will select for the successful prosecution of the war, and, therefore, may do many things which it could not constitutionally do in times of peace, and especially with regard to disregarding the ordinary distinction between State and Federal functions,<sup>99</sup> it none the less remains true that the express constitutional limitations upon the powers of Congress are not, for the time being, in abeyance. Thus, for example the provisions regarding due process of law, the making of compensation for private property taken for a public purpose, and, in general, the prohibitions of the first ten Amendments to the Constitution remain in force. And, in all cases, the right remains in the courts to determine whether acts sanctioned by Congress have, in fact, any possible relation to the successful prosecution of the war. However, it is to be assumed that in all cases the courts will, as to this, resolve all reasonable doubts in favor of the acts of Congress or of the Executive. The waging of war is, in its essence, an exercise of "police power," and, as such, the end will, in all reasonable cases, justify the means.

This subject will receive further consideration in the chapter dealing with Martial Law.

The power to wage war carries with it the authority not only to bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal. As the court said in *Stewart v. Kahn*:<sup>100</sup> "The measures to be taken in carrying on war and to suppress insurrection, are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and to the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

#### § 1034. Letters of Marque and Reprisal and Captures on Land and Water.

Congress is expressly authorized by the Constitution to grant letters of marque and reprisal and to make rules concerning captures on land and water.

It has been held that letters of marque may be granted to privateers to make captures within the territorial waters of the United States as well as upon the high seas.<sup>101</sup>

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<sup>99</sup> As to Federal regulation of intrastate commerce in time of war, see *Northern Pacific R. Co. v. N. Dakota* (250 U. S. 135). In this case the court said: "The complete and undenied character of the war power of the United States is not disputable."

<sup>100</sup> 11 Wall. 493.

<sup>101</sup> *The Experiment* (8 Wh. 261).

Similarly Congress may make rules concerning captures within the United States as well as upon the high seas or upon foreign soil.<sup>102</sup>

### § 1035. War Powers Subject to Constitutional Limitations.

Comprehensive though the powers of Congress are to authorize measures for the prosecution of a war, they are by no means, as already said, constitutionally unlimited, for there still remain in force, in war as well as in peace, the general constitutional limitations upon the exercise of Federal powers. This was not disputed by either the minority or majority justices in the *Milligan* case,<sup>103</sup> and the doctrine has been repeated in the cases which have arisen since the World War. In *United States v. L. Cohen Grocery Co.*<sup>104</sup> in which the court had under consideration the Food Control Act (Lever Act)<sup>105</sup> of 1919, it was declared: "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the powers of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

In *Hamilton v. Kentucky Distilleries Co.*<sup>106</sup> the court said: "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

The character of these constitutional limitations upon the powers of Congress in time of war will appear more fully in the discussion which is to come regarding Martial Law in the United States.<sup>107</sup>

With regard generally to the power of Congress to authorize operations for the carrying on of war, which operations would not be constitutional as peace measures, it is to be said that the measures thus justified are not limited to those which relate directly to military operations, nor is their constitutional basis destroyed by the cessation of active hostilities. These doctrines were illustrated and declared in *Hamilton v. Kentucky Distilleries Co.*<sup>108</sup> with reference to the Wartime Prohibition Act of November 21, 1918,<sup>109</sup> which, as is seen by its date, was passed after the Armistice of November 11, 1918, which brought active military operations to an end. In its opinion in this case the court, speaking unanimously, said: "Did the Act become void by the passing of the war emergency before the commencement of these suits? It is conceded that the mere cessation of hostilities under the armistice did not abridge or suspend the power of Congress to resort to prohibition of the liquor traffic as a means of increasing our war efficiency, that the support and care of the army and navy

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<sup>102</sup> *Brown v. United States* (8 Cr. 110).

<sup>103</sup> *Ex parte Milligan* (4 Wall. 121).

<sup>104</sup> 255 U. S. 81.

<sup>105</sup> 41 Stat. at L. 297.

<sup>106</sup> 251 U. S. 146.

<sup>107</sup> See Chapter LXXXVII.

<sup>108</sup> 251 U. S. 146.

<sup>109</sup> 40 Stat. at L. 1045.

during demobilization was within the war emergency, and that, hence, the act was valid when passed. The contention is that between the date of its enactment and the commencement of these suits it had become evident that hostilities would not be resumed, that demobilization had been effected, that thereby the war emergency was removed, and that when the emergency ceased the statute became void."

After referring to various facts which had been adduced as showing that a state of emergency had passed, the court, in its turn, adduced other acts which had been taken by Congress and by the President showing that, in their opinion, there still existed the need for exceptional governmental action. The opinion then continued: "Assuming that the implied power to enact such a prohibition must depend, not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (*United States v. Anderson*, 9 Wall. 56; *The Protector*, 12 Wall. 700; *Hijo v. United States*, 194 U. S. 315), but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in *Stewart v. Kahn*, 11 Wall. 493: 'The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.' "

The court admitted that a statute valid when enacted might, by a change of circumstances, become invalid, but went on to say that, a wide latitude of discretion should be accorded Congress in determining what the circumstances were and what remedial or regulatory action upon its part was demanded by them, and, with reference to the instant case, said: "In view of facts of public knowledge, some of which have been referred to, that the treaty of peace had not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid."

The prohibition law which was involved in this case was one which, except as a means of carrying on war, was not within the then constitutional power of Congress to enact. It is clear, then, that laws justified as measures of war remain constitutionally justified until war is brought legally to an end by a treaty of peace or otherwise.

### **§ 1036. Continuation of War Measures after the Termination of War.**

Whether war measures, constitutionally justified only as such, may continue in force after the termination of war, and until the abnormal conditions created by the war have substantially disappeared, is a more difficult question to answer. There are cases which would seem to imply that the

question may be answered in the affirmative, although, undoubtedly, the courts would refuse to recognize the validity of a flagrant abuse of this authority. The author has not found any cases bearing directly upon this point, but, in general, it seems reasonable to say that, after the legal termination of a war, Congress can be said to have the right to exercise no special or "police" powers other than those the exercise of which would be constitutionally justified to meet conditions of domestic insurrection or rebellion, or to secure the enforcement of the laws which, without regard to war or insurrection, it is entitled to enact for the maintenance, in general, of Federal authority. This phase, then, of what may be called the war powers of either the Congress or the President, is brought under the subject of Martial Law which will receive special treatment in Chapter LXXXVII. It may, however, be here observed that, thus viewed, a civil war presents a stronger ground for the continuance of the exercise of emergency powers after its termination than does a foreign war, for such a struggle is necessarily attended by domestic disorder and political disorganization which continue, or, at least, the consequences or *sequelæ* of which continue, for a considerable period of time after the war, properly speaking, has been brought to an end. To meet this situation there is recognized a state of affairs to which is applied the statement *bello non flagrante sed nondum cessante*. But, even in the case of foreign wars, it is necessary to wind up, after their conclusion, operations which have been undertaken as war measures,—operations which, as a practical proposition, it is not feasible to terminate abruptly and instantly, when the wars are legally terminated. For example, as was the case in the World War, it may have been necessary for the Government to assume complete control and operation of the railways and telegraph systems of the country. In such case it is apparent that some time will be needed for the return of these properties into private hands. Such rendition is necessarily a very complicated affair and cannot be affected within a day or a week or even months. In such cases, it is reasonable to hold, and it may be expected that the courts will so hold, that operations begun in time of war, and justified as means of carrying on the war, though not otherwise justified, will be permitted to continue in time of peace long enough to enable them to be terminated without an undue hardship to the Government, to the people of the United States, or to such private interests as may be involved.

We have, in fact, a declaration of the Supreme Court to substantially this effect. In *Commercial Trust Co. v. Miller*,<sup>110</sup> to the contention that the legal termination of the war by the Joint Resolution of Congress and its approval by the President on July 2, 1921, had brought to an end the operation of the Trading with the Enemy Act, so as to permit the courts to return to claimants property in the hands of the Alien Property Cus-

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<sup>110</sup> 262 U. S. 51.

todian, the court, repelling this contention, said: "The contention, however, encounters in opposition the view that the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that act shall be retained by the United States 'until such time as the Imperial German Government . . . shall have . . . made suitable provisions for the satisfaction of all claims.' " <sup>111</sup>

The reasoning with reference to the continuance in force of war measures after the legal termination of a war would seem to be at least partially applicable to a time before war is actually declared or recognized as existing, but when it is seen to be so imminent and apparently inevitable as to require that emergency measures be adopted either to prevent it, if possible, or to prepare for it, if it be not prevented.

It is clear that no constitutional objections could reasonably be made to acts of Congress passed in time of peace which provide that they shall not be operative except in time of war.

The power of the President to provide for the government of new territory acquired by the United States as the result of conquest or of a treaty of peace before Congress has by statute made provision therefor, will be presently discussed.<sup>112</sup>

### § 1037. War Powers of the States.

It has appeared earlier in this treatise, in the chapter dealing with the conduct of the Foreign Relations of the United States, that the States of the Union may not, as such, engage in a foreign war.<sup>113</sup> It has also appeared, however, that the States may, when the United States is at war, enact laws in aid of the United States which, in some cases at least, would not be valid except for the existence of the emergencies created by the war.

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<sup>111</sup> The so-called Overman Act of May 20, 1918 (40 Stat. at L. 566) expressly provided that the authority granted therein to the President might be exercised for a period of six months after the termination of the War. The Railway Control Act of March 21, 1918 (40 Stat. at L. 451), provided that the President might continue in control of the railroads for a period of twenty-one months "after the proclamation by the President of the exchange of ratifications of the treaty of peace."

<sup>112</sup> See the next Chapter.

<sup>113</sup> Whether or not they can, in times of domestic disorder, establish what can properly be termed a "state of war" will be considered in the chapter on "Martial Law."

During the World War there was a very considerable body of such legislation by the States.

A case which bears upon this point is that of *Gilbert v. Minnesota* <sup>114</sup> in which it was held that Federal power had not been usurped or encroached upon by a State which, by its statute, had made criminally punishable the advocating or teaching that men should not enlist in the military or naval forces of the United States. The court, in the course of its opinion, said: "This country is one composed of many, and must on occasion be animated as one, and . . . the constituting sovereignties must have power of cooperation against the enemies of all. Of such instance, we think, is the statute of Minnesota." <sup>115</sup>

The Chief Justice dissented on the ground that there was in force a Federal statute which covered the entire ground and therefore precluded the exercise of a concurrent jurisdiction by the State. Justice Brandeis dissented on the ground that the State statute was not a war measure since its operation was not limited to times of war, and that, as a peace law, it was not constitutionally justified as a police measure, and was, as well, an interference with Federal functions.

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<sup>114</sup> 254 U. S. 325.

<sup>115</sup> The court also said that the statute might be supported as an exertion of the State's police power to preserve the peace of the State.

## CHAPTER LXXXVI

### MILITARY GOVERNMENT

Government of specific areas by the military forces of the United States under the command of the President may constitutionally exist in time of peace as well as in time of war, and with reference to domestic as well as to foreign territories.

#### § 1038. Military Government of Foreign Territory.

Government of foreign territories by the armed forces of the United States may result from occupation in time of war or in execution of treaty provisions.

During the Spanish-American War, Cuba, then a colony of Spain, was seized and in part occupied by American troops and governed by them under the authority of the President in pursuance of his war powers. By the treaty of peace between Spain and the United States, which was signed at Paris on December 10, 1898, and ratifications exchanged and proclamation made on April 11, 1899, it was provided that Spain relinquished all sovereignty over and title to Cuba, and that "as the island is, upon its evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property."<sup>1</sup>

Under this treaty provision the United States remained in military occupation of the island until May 20, 1902, when the autonomous and sovereign Republic of Cuba was inaugurated. During this period, the United States exercised through its military forces full governing powers, including the dictation and control of the steps leading up to the ordaining and establishing of the Cuban Constitution.

In *Neely v. Henkel*,<sup>2</sup> it was held by the Supreme Court that, during this period, Cuba was territory foreign to the United States and that the American military occupation and control originally established as a military means of carrying on the war, and justified as such, had been continued as a means of carrying out a treaty obligation entered into by the United States,

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<sup>1</sup> Article I. Article XVI of this treaty also provided: "It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations."

<sup>2</sup> 180 U. S. 109.

and constitutionally justified as such, and that the act of Congress, the validity of which was contested in the case, had been justified as in aid or execution of that treaty obligation.<sup>3</sup>

The law of military occupation of foreign territory in time of war is that sanctioned by general international law. According to this, the power of the military commander is legally supreme. For no act that he or his subordinates may commit can he or they be held liable in the civil courts of the United States or of the State whose territory is occupied. The only limits to the military authority are those which international law and usage, upon the ground of humanity and justice, impose, and breaches of these are cognizable only in the military courts. As was said in *New Orleans v. Steamship Co.*<sup>4</sup> and repeated in *Dooley v. United States*:<sup>5</sup> "The conquering power has the right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists, who have considered the subject."

In Lieber's "Instructions for the Government of Armies of the United States in the Field," we read:

"Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or country, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, so far as military necessity requires this suspension, substitution or dictation.

"The commander of the forces may proclaim that the administration of all civil and penal law shall continue wholly or in part, as in times of peace, unless otherwise ordered by the military authority."

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<sup>3</sup> The court said: "It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba, and determined to occupy and control that island until there was complete tranquillity in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty, under international law and pending the pacification of the island, to protect in all appropriate legal modes the lives, the liberty, and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the treaty of Paris, and the act of June 6, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty and in discharge of the obligations imposed by its provisions upon the United States."

<sup>4</sup> 20 Wall. 387.

<sup>5</sup> 182 U. S. 222.



When in military occupation of foreign territory in time of war the members of the United States forces, military and naval, are bound by such rules or regulations as have been provided by Congress or by the President as their constitutional commander-in-chief. For violations of these rules or regulations they may be punished by military processes.

During military occupation of foreign territory, though there is no obligation by either constitutional or international law to establish courts or to permit the continued operation of local courts for the trial of ordinary civil and criminal cases according to local law, there is nothing to prevent this being done, and in fact, in modern times this is usually done. Indeed, the principle is now well established that, until expressly declared otherwise, local private law and the tribunals for its administration, continue in operation. But in all such cases the courts, whether established or allowed to continue, exist essentially as military courts, and the law which they enforce has validity only by military order and permission; for the first effect of military occupation is to sever, for the time being, all the former political relations of the inhabitants of the territory, and to destroy the *de jure* character of the former organs of government.<sup>5a</sup>

#### § 1039. Military Government of Domestic Territory in Time of War.

In practically all respects the laws governing the military occupation of hostile foreign territory apply to the military occupation of hostile domestic territory in time of a civil war which has assumed a public character.

In the case of *New Orleans v. Steamship Co.*,<sup>6</sup> from which quotation has already been made, the court said: "Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war."<sup>7</sup>

The fact that the sovereign State continues to claim sovereignty and to exercise powers as such does not prevent it from exercising at the same time all the rights of a belligerent. This was conclusively determined in the Prize cases.<sup>8</sup> In that case, as will be remembered, it was held that there lies within the discretion of the President as commander-in-chief of the army, a discretion not reviewable by the courts, to determine when an insurrection or civil war has assumed such proportions as to warrant him in declar-

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<sup>5a</sup> See *Coleman v. Tennessee* (97 U. S. 509).

<sup>6</sup> 20 Wall. 387.

<sup>7</sup> Citing the Prize cases (2 Black, 635); *Mrs. Alexander's Cotton* (2 Wall. 404); and *Mauran v. Insurance Co.* (6 Wall. 1).

<sup>8</sup> 2 Black, 635

ing it to be public war, and the insurrectionists to be belligerents. When this is done, the war becomes a territorial one, and all inhabitants of the revolting district become *ipso facto* public enemies.

In *Mrs. Alexander's Cotton* <sup>9</sup> the court declared: "It is said that though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but the court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced by this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed."

In *Miller v. United States* <sup>10</sup> was sustained the authority of the acts of Congress of 1861 and 1862, providing for the confiscation of certain classes of private property owned by persons living in the insurrectionary districts, the acts being upheld not as criminal statutes but as an exercise of belligerent right. Had the acts been simple municipal laws inflicting a punishment for an offence against the sovereignty of the United States, they would, the court said, be in violation of the Fifth and Sixth Amendments to the Constitution, but, being a legitimate exercise of a belligerent power, they were constitutional, not only with reference to the hostile, but to the friendly inhabitants of the hostile territory, as well as to those persons who, though not inhabitants of the hostile territory, should in any way aid or abet the insurrection.

The right of confiscation and other belligerent rights thus exercisable by the military authorities within the United States during civil war must, in every case, be authorized by some competent officer or tribunal acting under the sanction of an act of Congress. That is to say, the individual soldier or officer is not allowed individually, and without obtaining the decree of a competent military or other tribunal, to seize private property as a prize of war. This principle was discussed in the early case of *Brown v. United States*.<sup>11</sup> As was said in that case, "War gives the right to confiscate, but does not itself confiscate the property of the enemy." For this an act of Congress is necessary. "When war breaks out, the question what shall be done with enemy property in our country is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary."

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<sup>9</sup> 2 Wall. 404.

<sup>10</sup> 11 Wall. 268.

<sup>11</sup> 8 Cr. 110.

**§ 1040. Military Government of Domestic Territory in Times of Peace.**

Military governments established on foreign territory in time of war do not necessarily come to an end with the declaration of peace and the annexation of the occupied territory to the United States; and the same is true after the conclusion of peace of military governments established in insurrectionary domestic territory. But these governments, though military in character, rest upon a different basis, and have somewhat different powers from those maintained during war.

Military governments in time of peace, whether in territories newly annexed to the United States, or in districts lately in rebellion, no longer derive their authority from the President as commander-in-chief of the army and navy, but exist by the tacit or express command of Congress. Until Congress acts, the President may maintain military governments by virtue of the fact that he is commander-in-chief of the army and navy and obligated to take care that the laws be faithfully executed wherever Federal sovereignty extends. Such governments as he may establish or continue in existence after the conclusion of war in annexed territory are, however, subject to the will of Congress either to change or abolish.

Illustrative of this principle were the military governments set up in the Southern States during and after the conclusion of the Civil War. While that war was in progress there was no question as to the power of the Executive to set up military governments in districts occupied by the Federal troops. With the conclusion of that war, however, Congress at once asserted its exclusive right to determine the manner in which the States lately in secession should be ruled until their civil status should be fully restored.

The right of Congress to maintain military governments in States of the Union after the restoration of peace was based partly on the ground of military necessity—that, though war had ceased, the results for which it had been waged were not yet fully secured—and partly on the ground that it lay with Congress to guarantee to the States loyal governments republican in form, and that to obtain these it was necessary for a time to furnish protection to the loyal portions of their populations.

The status of these military and “reconstruction” governments was exhaustively considered in the great case of *Texas v. White*,<sup>12</sup> decided in 1869.

After referring to the various steps taken to put down the rebellion and establish civil rule in Texas, the court said:

“The power exercised by the President was supposed doubtless to be derived from his constitutional functions as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary governments in insurgent districts, occupied by the national forces, or take

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<sup>12</sup> 7 Wall. 700.

measures, in any State, for the restoration of State governments faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty [of government republican in form] is primarily a legislative power, and resides in Congress. Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guaranteed to each State a republican form of government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not. This is the language of the late Chief Justice speaking for this court in a case from Rhode Island (*Luther v. Borden*, 7 How. 1) arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government by revolutionary violence, though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State."

That, until Congress acts, the military governments established by the President under his war powers may continue in existence after the conclusion of peace in territories belonging to the United States, has been several times declared by the Supreme Court.

Thus, with reference to the continuance of the military government established in California after its annexation to the United States, the court, in *Cross v. Harrison*,<sup>13</sup> declared:

"It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government."<sup>14</sup>

The principle thus laid down in *Cross v. Harrison* was followed by the court in the *Insular* cases with reference to the continuance of the military governments in Porto Rico and the Philippines, after their annexation by the United States.

In *Santiago v. Nogueras*<sup>15</sup> the court said: "By the ratifications of the

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<sup>13</sup> 16 How. 164.

<sup>14</sup> Upon this point see Magoon, *Reports on the Law of Civil Government in Territory Subject to Military Occupation*, p. 17, and authorities there cited.

<sup>15</sup> 214 U. S. 260.

treaty of peace, Porto Rico ceased to be subject to the Crown of Spain, and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation, and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief."

To the author it would seem that, though the general proposition stated in this case is that, after annexation of the territory and until action by Congress, the government established by the President could constitutionally continue to exist, it was not proper to describe that government as essentially a "military" one. It was, rather, an "executive" one maintained by the President in pursuance of his constitutional obligation to see that the authority of the United States over the territory was maintained, and, from the circumstances of the case, in the absence of congressional action, it was necessary for him to rely almost if not wholly upon the armed forces of the United States. It was only in this sense a military government. In essence it was a civil government though carried on, *ex necessitate*, by or through the military forces available to the President. In this respect it was not essentially different from the government of the Philippine Islands maintained for several years under the express authorization of Congress.

This distinction between a government essentially military in character, and one administered through the agency of the army or navy in time of peace over domestic territory by the President explains the fact that, in the two cases the powers of the President are not the same.

Though military in form, the governments established or maintained by the President in time of peace in territories subject to the sovereignty of the United States may not be granted as complete a governing authority as that which they possess in time of war. The authority which may constitutionally be given to or exercised by them is determined by the purposes for which they exist. In time of war they have full power, legislative, executive and judicial, to do anything the laws of war, as determined by international usage, permit to be done, that will strengthen themselves or weaken the enemy. War having ended, however, and the territory become

domestic, the powers of the military commander become simply administrative in character, and his acts, so far as the necessities of the case permit, are limited by the general and constitutional laws of the country under whose authority he acts. He, in fact, enjoys authority no longer by virtue of belligerent right, but as an agent of the sovereign of the country for the establishment and maintenance of civil rights therein. As Magoon expresses it, he ceases to occupy the place of the suspended or expelled sovereignty, and becomes an instrument of the new sovereignty. He becomes the representative of sovereignty, instead of a substitute.<sup>16</sup>

The powers of the military government in time of peace in domestic territory being those simply of a local administrative agent of the United States, they are subject to two general limitations. First, being of an administrative character, they do not include general legislative power, that is, the authority to establish laws with more than strictly local effects; and, second, such powers as are possessed, are subject to the privileges and immunities created and guaranteed by the Constitution. How far these constitutional privileges apply to governments, whether military or civil, established in territories belonging to, but not "incorporated" into the United States, has been considered in an earlier chapter. In all other domestic territory, whether in a Territory or in a State lately in rebellion, these constitutional limitations apply, and the agents have, therefore, and can be endowed by Congress and the executive with only such powers as may be exercised at any time and in any place under the doctrines of "martial" as distinguished from "military" law.<sup>17</sup> In short, their extent is measured by the necessity for their exercise.

Acting upon this principle, the Supreme Court in *Raymond v. Thomas*<sup>18</sup> held void an act of a reconstruction military commander in South Carolina, by which he attempted to annul the decree of a court of that State. In its opinion the court said: "It was an arbitrary stretch of authority needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires."<sup>19</sup>

With reference to the absence of general legislative power, after war is terminated, the court in *Dooley v. United States*<sup>20</sup> held that though, prior to the treaty of peace, the military commander might, as a belligerent

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<sup>16</sup> *Reports on the Law of Civil Government in Territory Subject to Military Occupation*, p. 20.

<sup>17</sup> See the next chapter.

<sup>18</sup> 91 U. S. 712

<sup>19</sup> Citing *Mitchell v. Harmony* (13 How. 115).

<sup>20</sup> 182 U. S. 222.

right, levy customs duties on goods coming into Porto Rico from the United States, after that date he no longer had the authority.<sup>21</sup>

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<sup>21</sup> In its opinion the court said:

"In their legal aspect, the duties exacted in this case were of three classes: (1) The duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander in Chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island to the United States; (3) from the ratification of the treaty to May 1, 1900, when the Foraker act took effect.

"There can be no doubt with respect to the first two of these classes, namely, the exaction of duties under the war power, prior to the ratification of the treaty of peace. . . .

"Different considerations apply with respect to duties levied after the ratification of the treaty and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and, as we have just held in *De Lima v. Bidwell*, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications. We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress. *Cross v. Harrison* (16 How. 164). At the same time, while the right to administer the government continued, the conclusion of the treaty of peace and the cession of the island to the United States were not without their significance. By that act, Porto Rico ceased to be a foreign country, and the right to collect duties upon importations from New York to Porto Rico also ceased. The spirit as well as the letter of the tariff laws admits of duties being levied by a military commander only upon importations from foreign countries; and, while his power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. For instance it is clear that, while a military commander during the Civil War was in occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions,—in other words, they would not extend beyond the necessities of the case. Thus, in the case of *The Admittance* (*Jecker v. Montgomery*, 13 How. 498) it was held that neither the President nor the military commander could establish a court of prize competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war 'were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize,' although Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. *The Grapeshot* (9 Wall. 129); *sub nom.* *The Grapeshot v. Wallerstein*.

"So, too, in *Mitchell v. Harmony* (13 How. 115), it was held that, where the plaintiff entered Mexico during the war with that country, under a permission of the commander to trade with the enemy and under the sanction of the executive power of the United

States, his property was not liable to seizure by law for such trading and that the officer directing the seizure was liable to an action for the value of the property taken. To the same effect is *Mostyn v. Fabrigas* (1 Cowp. 180)."

See also *MacLeod v. United States* (229 U. S. 416).

For an extended account of the manner in which newly annexed territories have been governed by the United States, see D. Y. Thomas, *A History of Military Government in Newly Acquired Territory of the United States*, XX Columbia University Studies in History, Economics and Public Law, 1904. See also, Chapter IX Berdahl's *War Powers of the Executive in the United States*.



## CHAPTER LXXXVII

### MARTIAL LAW

#### § 1041. Martial Law Defined.

In the most comprehensive sense of the term, Martial Law includes all law that has reference to, or is administered by, the military forces of the State. Thus it includes (1) Military Law Proper, that is, the body of administrative laws created by Congress for the government of the army and navy as an organized force; (2) the principles governing the conduct of military forces in time of war, and in the government of occupied territory; and, (3) Martial Law *in sensu strictiore*, or that law which has application when the military arm does not supersede civil authority but is called upon to aid it in the execution of its civil functions. This last form of Martial Law which is to be considered in this chapter is to be sharply distinguished from those forms of Military Law which have been considered in the preceding chapters.<sup>1</sup>

#### § 1042. Martial Law, in Sensu Strictiore, is a Form of the Police Power.

That which brings confusion between martial law, in the strict sense of the term, and military law or military government, is the fact that military forces are, in most cases, employed in times when martial law is said to be in force, and, usually, when there exists a degree of necessity which justi-

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<sup>1</sup> "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under the military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities whose ordinary law no longer adequately secures public safety and private rights." *Ex parte Milligan* (4 Wall. 2).

It may be observed that down to the time of 1689, and indeed nearly a century later when discussed by Blackstone, when Martial Law was spoken of, reference was had to the first two of the above described forms of military jurisdiction.

fies the exercise by the authorities of the State of measures more drastic in character than are ordinarily employed or justified for the protection of the public against unlawful acts. These usual features, however, do not change the essential character of the situation which exists, or operate to transmute the civil measures which are taken, or which may constitutionally be taken, into essentially military acts which can be justified as such. In other words, as will appear from the exposition which is to follow, martial law, in its restricted sense, as has been explained, belongs in the field of civil rather than of military law, and is, in fact, but a branch of the public law of the State, and, as such, its exercise is, or should be, governed by the same fundamental principles of constitutional right that apply when the so-called Police Powers of the State are exercised under ordinary conditions and without the employment for their enforcement of the organized armed forces of the State.

Chief among the fundamental principles of American constitutional jurisprudence is the right of the individual to be secure against invasion of his personal and property rights by arbitrary or irresponsible acts upon the part of agents of his government. To provide this security has been one of the purposes of our written constitutions. This fundamental doctrine means, then, that nowhere in our governments has there been vested absolute power, that is, authority the limits and definition of which the person expressing it himself fixes, and for the improper exercise of which, or for an *ultra vires* act, he may not be held civilly and criminally responsible. As the Supreme Court in *United States v. Lee*,<sup>2</sup> speaking through Justice Miller, declared:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to the supremacy, and to observe the liabilities which it imposes upon the exercise of the authority which it gives."<sup>3</sup>

### § 1043. Police Power Defined.

In a later chapter, which deals with Due Process of Law, the conception of the "Police Powers" of the State, as it has found lodgment and development in American constitutional jurisprudence, will be considered at length. However, in order that the true nature of Martial Law, in the sense in which it is employed in this chapter, may be clearly shown, it will be necessary here to state, in general terms, what, in American constitutional law, is meant by the Police Power.

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<sup>2</sup> 106 U. S. 196.

<sup>3</sup> See *ante*, § 911.

The recognition that there exist rights of life, liberty, property and happiness which are possessed by the individual and which are guaranteed against arbitrary and unreasonable invasion by other persons, public or private, does not imply that these rights are absolute in character, in the sense that they may not be limited or their exercise controlled when, in the interests of the community or of the State, this is deemed necessary, and when the control over their exercise is of a reasonable and non-arbitrary character. This is so for the reason that, more fundamental than the right of the private individual, is the right of the public person, the State, and, more important than the convenience or even the existence of the citizen, are the welfare and life of the civic whole, and thus we find that, fundamentally, no system of political and legal philosophy, save that of pure anarchism, can start with the individual. It is true that all governments have an ethical right to be only in so far as, by their existence, they promote the welfare of their citizens, but, for this very reason, it is necessary that the State, whatever the origin or form of its governmental organization, should possess the power in all cases of need to subordinate private rights to public necessities. Thus every State has the power to exact in the form of taxes contributions from its citizens for its support. It has the power to compel them to serve in its armies, and to lay down their lives that its life, or its real or imagined interests, may be protected. It may take private property for a public use, without the consent of its owner. It may declare what shall constitute a crime, and affix and enforce penalties for its commission. It may decline to enforce contracts which it may deem contrary to public policy, and even penalize entering into them. It may control all so-called public employments, and fix the rule for services and commodities which they may charge; and, since the decision of the famous case of *Munn v. Illinois* <sup>4</sup> our courts hold that the State may exercise a similar oversight over all industries which become for any reason "affected with a public interest." Finally, and without reference to whether or not an employment is public, or affected with a public interest, the State may see to it that the individual in the use of his freedom of action, of contract, or of property, does not unduly prejudice the interests of others or society at large. This last comprehensive authority is denominated the Police Power.

In a general, and yet in an essentially correct sense, all of the legal control exercised by a State over persons and property, whatever form it may take, is an exercise of the State's Police Power. In American constitutional law, however, characterized as it is by the existence of written constitutional limitations upon the legal powers of governmental organs (whether legislative, executive or judicial), the phrase Police Power is ordinarily limited in its application to the general power which the State, in cases of need, may

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<sup>4</sup> 94 U. S. 113.

employ without reference to the ordinary private rights of person and property of the individual.

#### § 1044. Police Power Further Defined.

One of the classic definitions of the Police Power is that of Chief Justice Shaw, given in his opinion in *Commonwealth v. Alger*.<sup>5</sup> He says: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor.<sup>6</sup> The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise."

Hare, in his *American Constitutional Law*,<sup>7</sup> says:

"The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant. Chartered rights and privileges are therefore like other property, held in subordination to the authority of the government, which may be so

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<sup>5</sup> 7 Cush. 53.

<sup>6</sup> This requirement of compensation in the case of the appropriation of private property under the right of eminent domain, is created in this country by express constitutional provisions. In the absence of such constitutional provisions, express or implied, the individual thus deprived of property would have no legal claim for damages. To the author it appears proper to group the power of eminent domain under the general police powers of the State.

<sup>7</sup> Vol. II, 766.

exercised as to preclude the use or doing of the very thing which the company was constituted or authorized to manufacture or perform. The legislature cannot be presumed to have intended to tie its hands in this regard in the absence of express words; but if such a purpose were declared, it would fail, as an attempt to part with an attribute of sovereignty which is essential to the welfare of the community."

#### **§ 1045. Police Power Limited.**

Though, as we have seen, there are necessarily many circumstances under which the political power, in behalf of public interests, may interfere with the freedom of action of the individual and the use by him of his own property, in no one of these cases may this interference be an arbitrary one. That is to say, in each case, the propriety of the interference may be questioned by the individual, and, when so questioned, the official whose act constitutes the interference must be able to justify his act by referring to a valid law and to some consideration of public necessity or convenience. If a person is drafted into military service, there must have been enacted a valid drafting law, including within its application the class of persons to which the individual drafted belongs. If a contract formally valid is refused enforcement, it must be shown to be opposed to public policy. If property is taken under eminent domain, it must be for a public use, and compensation must be given. If the rates charged by public service corporations are regulated by law, the regulation must be a reasonable one and not one, in its effect, confiscatory of private property. Finally, to constitute a valid exercise of the so-called police power of the State, there must be shown some public advantage to be gained by thus interfering with the personal liberty and property rights of the individual. The foregoing observations are, of course, in their application, restricted to systems of government, such as are found in the United States, which operate under constitutional limitations.

Now, in exactly the same way in which the civil authorities may by law or through executive action control the activities of the individual and the use of his property in the interest of the public good, the military arm of a government may be employed to preserve the public peace and to secure the execution of the laws.

In European countries, living under written constitutions, provision is quite generally made for the declaration in times of danger of what is called a "state of siege," the effect of which is immediately to suspend the operation of all the ordinary constitutional limitations upon executive power. No similar status is known to American law. The use of the military arm of our States or of the Federal Government in time of peace and upon domestic soil to maintain order and secure the execution of law in no wise operates to suspend civil law or to negate individual rights of liberty and property, any more than the exercise of the ordinary police powers by the

State has this effect. The use of the military forces of a State for the maintenance of order and law is, indeed, not dissimilar in purpose and character to the employment by a sheriff of a *posse comitatus* to assist him in making an arrest, preventing an escape, or executing a writ. In all these cases those who exercise authority are obliged to justify whatever acts they may have committed by showing their necessity, or, at least, producing evidence to show that they had reasonable grounds for believing them to be necessary.

#### § 1046. Martial Law Does Not Abrogate Civil Law and Civil Guarantees.

There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military law is substituted for civil law. So-called declarations of martial law are, indeed, often made, but their legal effect goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law. Some of the authorities stating substantially this doctrine are quoted in the footnote below.<sup>8</sup>

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<sup>8</sup> "The term martial law refers to the exceptional measures adopted whether by the military or the civil authorities, in times of war or of domestic disturbance, for the preservation of order and the maintenance of the public authority. To the operation of martial law all the inhabitants of the country or of the disturbed district, aliens as well as citizens, are subject." Moore, *Int. Law Digest*, II, 186. As to the subjection of aliens to Martial Law, see Moore, II, 196.

In the cases of the Bristol Riots in 1831-1832 (S. T. U. S. III, 2-56), the opinion reads: "A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself if without necessity he takes human life. The duty of magistrates and peace officers to summon or to abstain from summoning the assistance of the military depends in like manner on the necessities of the case. . . . The whole action of the military when called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance or defines beforehand every contingency which may arise. . . . The question whether, on any occasion, the moment has come for firing upon a mob of rioters, depends, as we have said, on the necessities of the case. . . . An order from the magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favor of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer from declining to fire when the necessity exists. With the above doctrines of English law the Riot Act does not interfere. Its effect is only to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony; and on this ground to afford statutory justification for dispersing a felonious assemblage, even at the risk of taking life."

In *Ela v. Smith* (5 Gray [Mass.], 121) the court said: "While thus recognizing the

During the time that the military forces are employed for the enforcement of law, that is to say, when so-called martial law is in force, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the individual are suspended.<sup>9</sup> The relations of the citizen to his State are unchanged. Whatever interference there may be with his personal freedom or property rights must be justified, as in the case of the police power, by necessity, actually existing or reasonably presumed. During times of disorder, such as lead to a call upon the military forces for assistance, necessity naturally demands the commission of acts which in more tranquil times are not demanded, and thus in fact, those in authority may control the individual and his property in ways which they could not legally do at other times, but the principle still holds good that necessity, and necessity alone, will justify an infringement upon private rights of person and property.

#### § 1047. Martial Law and Military Government Distinguished.

It is thus seen that martial rule, that is, the use of the military arm for the enforcement of civil law, is something quite different from the establishment of military government over territory conquered in public war. Mr. Magoon draws this distinction admirably in the following words: "A military government," he says, "takes the place of a suspended or destroyed *sovereignty*, while martial law, or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty. The occasion of military government is the

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authority of the civil officers to call out and use an armed force to aid in suppressing a riot or tumult actually existing, or preventing one which is threatened, it must be borne in mind that no power is conferred on the troops, when so assembled, to act independently of the civil authority. . . . They are to act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statute, as to the specific duty or service which they are to perform. Nor can the magistrate delegate his authority to the military force which he summons to his aid; or vest in the military authorities any discretionary power to take any steps or do any act to prevent or suppress a mob or riot. They must perform only such service, and render such aid, as is required by the civil officers. . . . It does not follow from this, however, that the military force is to be taken wholly out of the control of the proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and to manage the details in which a specific service or duty is to be performed. But the service or duty must be first prescribed and designated by the civil authority."

<sup>9</sup> The writ of habeas corpus may have been suspended. Of this we shall speak presently. But this suspension does not give any additional arbitrary authority to either the civil or military authorities,—it does not operate to legalize any act of theirs that otherwise would have been illegal. The only effect of the suspension of the writ is to prevent, for the time being, a judicial examination of the legality of the detention of the individual.

expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion. The occasion of martial rule is simply public exigency which may rise in time of war or peace. A military government since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions.”<sup>10</sup>

**§ 1048. Luther v. Borden.**

At the time of Dorr's Rebellion the legislature of Rhode Island passed the following act: “Be it enacted . . . the State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force, until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State.”

In the case of *Luther v. Borden*<sup>11</sup> an action of trespass *quare clausum fregit* was brought by the plaintiff against the defendant for breaking and entering the house of Luther. Borden set up as defense that he was a member of the militia called out in defence of the old government, that he acted under orders, and that those orders were justified by the exigencies of the time. The case having reached the Supreme Court, Taney, in his opinion, said:

“In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by the State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of the military force and the declaration of martial law,

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<sup>10</sup> *Reports on the Law of Civil Government in Territories Subject to Military Occupation*, p. 12.

<sup>11</sup> 7 How. 1.



we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest anyone, who, from the information before them they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, and any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."

#### § 1048a. Martial Rule and War Distinguished.

The correctness of the reasoning and of the conclusion of the Chief Justice in this case cannot be questioned except in one respect. Speaking of the condition of affairs existing at the time the alleged trespass was committed, Taney said: "It was a state of war and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition." It is not correct to say that war then existed in Rhode Island. War, in public law, has, as is well known, a definite meaning. It means a contest between public enemies termed belligerents, and, to the status thus created, definite legal rights and responsibilities are attached by international and constitutional law. War is thus sharply distinguished from a mere insurrection or resistance to civil authority. Until the parties to such a contest are recognized as belligerents, that is, until the struggle has become a "war," the matter is wholly one of ordinary law,—one lying wholly without the province of the rules which define and fix the laws and usages of war. Thus Luther's act was undoubtedly justified, under the constitutional principles governing the rule of martial law, but it could have received no sanction from the laws of war which are applicable only to a state of war. Indeed, it may be said that a State of the Union has not the constitutional power to create, by statute or otherwise, a state of war, or by legislative act or executive proclamation to suspend, even for the time being, all civil jurisdiction.

This point was emphasized by Justice Woodbury in his dissenting opinion. After showing that for many years no such an act would be tolerated in England, and pointing out the constitutional safeguards to personal liberty that have been specifically provided in American public law, the justice said: "It looks certainly like pretty bold doctrine in a constitutional government,

that, even in time of legitimate war, the legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet." "In fact, however," Woodbury continued, "no war in a technical sense, that is, as distinguished from a domestic insurrection, existed or constitutionally could have existed in Rhode Island at the time. No State of the Union" he pointed out, "has the authority to declare war, this power, by the federal Constitution, being vested in Congress,<sup>12</sup> or to engage in war unless actually invaded, or in such imminent danger as will not admit of delay,"<sup>13</sup> this last qualification without doubt referring to danger from a foreign source or from Indians. The dissenting opinion continued: "Congress alone can declare war, and . . . all other conditions of violence are regarded by the Constitution as but ordinary cases of private outrage to be punished by prosecutions in the courts, or as insurrections, rebellions or domestic violence, to be put down by the civil authorities, aided by the militia; or, when these prove incompetent, by the General Government when appealed to by the State for aid, and matters appear to the General Government to have reached the extreme stage, requiring more force to sustain the civil tribunals of a State, or requiring a declaration of war, and the exercise of all its extraordinary rights. Of these last, when applied to as here, and the danger has not been so imminent as to prevent an application the General Government is responsible for the consequences."

#### § 1049. Martial Law in Time of War.

Thus far the discussion has related to martial law as exercisable in time of peace, that is, in times when, to be sure, civil disorder prevails, but when war—public war—does not exist. We have now to speak of martial law when this latter condition is present.

It has already been learned that in war the enemy, be he a foreign one, or a rebel to whom the status of belligerent has been given, has no legal rights which those opposed to him must respect.<sup>14</sup>

When a civil contest becomes a public war, all persons living within limits declared to be hostile become *ipso facto* enemies, and subject to treatment as such. As the Supreme Court, in *Ford v. Surget*,<sup>15</sup> said with reference to the Civil War: "The district of country declared by the constituted authorities, during the late Civil War, to be in insurrection against the government of

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<sup>12</sup> Art. I, Sec. 8.

<sup>13</sup> Art. I, Sec. 10, Cl. 3.

<sup>14</sup> He has of course those rights which international law recognizes, but these are not of a constitutional, or, strictly speaking, of a legal nature. The rebel, though recognized as a belligerent, and, therefore, not entitled to claim from the government which he is resisting any of the rights created by its law, may, by that government, if it sees fit, be held responsible as a violator of its law. See Prize cases (2 Black, 635).

<sup>15</sup> 97 U. S. 594.

the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war, and while they remained within the lines of insurrection, as enemies, without reference to their personal sentiments and dispositions."

Different conditions prevail, however, in loyal districts. In these the existence of war does not operate to destroy or suspend the civil rights of the inhabitants.

Upon the actual scene of war, there is no question but that, for the time being, the military authorities are supreme, and that these may do whatever may be necessary in order that the military operations which are being pursued may succeed. Here martial law becomes indistinguishable from military government. "When martial law is invoked in face of invasion or rebellion that rises to proportions of belligerency, it is war power pure and simple."<sup>16</sup> It is in this sense that Field defines martial law as "simply military authority exercised in accordance with the laws and usages of war," and the Supreme Court defines it as "the law of necessity in the actual presence of war."<sup>17</sup>

The necessities being great and extraordinary, the executive and administrative, that is to say, the military, action that will be justified is correspondingly extensive. But, the populace being loyal, and the territory domestic, private rights of person and property still persist, though subject, as in all other cases, to the exercise of the police powers of the State. Those who exercise these powers, though military in character, still remain liable for any abuse of their authority. The civil courts are not necessarily closed, nor are any of the private actions of individuals subject to restraint except in so far as the efficiency of public service may require.

Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but is a taking for the public use which, under the provision of the Fifth Amendment, demands that compensation be made. The manner of taking may, however, be that of the police power, in that the urgency may not permit the ordinary proceedings for valuation and condemnation.<sup>18</sup>

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<sup>16</sup> Berkheimer, *Military Law*, 2d ed., 399.

<sup>17</sup> *United States v. Diekelman* (92 U. S. 520).

<sup>18</sup> "Private property, the Constitution provides, shall not be taken for public use without just compensation. . . . Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate or impending danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Exigencies of this kind do arise in time of war or

In *Mitchell v. Harmony* <sup>19</sup> Chief Justice Taney stated the general principle governing the authority and responsibility of military officers in the following words:

"There are," he said, "occasions where private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property and take it for public use. Under these circumstances the government is bound to make full compensation to the owner; but the officer is not a trespasser. But in every such case the danger must be present or impending, and the necessity such as does not admit of delay or the intervention of the civil authority to provide the requisite means. It is impossible to define the particular circumstances in which the power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of facts as they appeared at the time will govern the decision, because the officer in command must act upon the information of others as well as his own observation. And if, with such information as he can obtain, there is reasonable ground for believing that the peril is immediate or the necessity urgent, he may do what the occasion seems to require, and the discovery that he was mistaken will not make him a wrongdoer. It is not enough to show that he exercised an honest judgment, and took the property to promote the public service, he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right. Unless this is established, the defense must fail because it is very clear that the law will not permit private property to be taken merely to insure the success of an enterprise against a public enemy. . . . It can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."

#### **§ 1050. Exercise of Military Authority outside the Immediate Theatre of War: Ex Parte Milligan.**

Under the stress of military exigency, upon the actual theatre of war such civil guarantees as the writ of habeas corpus, immunity from search

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impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner." *United States v. Russell* (13 Wall. 623; 20 L. ed. 474).

<sup>19</sup> 13 How. 115.

and seizure, etc., may, of course, be suspended. As to this there is no question. There is, however, a serious question whether, when war exists, these rights may, by legislative act or executive proclamation, be suspended in regions more or less remote from active hostilities. This question was raised and carefully considered in the famous *Milligan* case<sup>20</sup> in which the Supreme Court was called upon to pass upon the authority of a military commission, during the Civil War, to try and sentence upon the charge of conspiracy against the United States government one Milligan, who was not a resident of one of the rebellious States, nor a prisoner of war, nor ever in the military or naval service of the United States, but was at the time of his arrest a citizen of the State of Indiana in which no hostile military operations were then being conducted.

The military commission had been created pursuant to an act of Congress of March 3, 1863, authorizing the suspension of the writ of habeas corpus throughout the United States by the President, but providing that lists of persons, not prisoners of war, held under military authority should be furnished within a given time to the judges of the Federal circuit and district courts, and that one so imprisoned whose name was not thus reported might appeal for release to the civil courts.

Five of the justices of the Supreme Court held that Congress was without the constitutional authority to suspend or authorize the suspension of the privilege of the writ of habeas corpus and to provide military commissions in States outside the sphere of active military operations and with their civil courts open and ready for the transaction of judicial business. The remaining four justices held that Congress had not in fact made legislative provision for the military tribunal in question, but asserted that it possessed the constitutional authority so to do, should it see fit.

Shortly speaking, the argument of these four dissenting justices was as follows: "Congress," they said, "has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all power essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. . . . We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine to what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or

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<sup>20</sup> *Ex parte Milligan* (4 Wall. 2).

security of the army or against the public safety. . . . It was for Congress to determine the question of expediency."

The fact that the civil courts were open and undisturbed in the execution of their functions is not to be taken as conclusive evidence that the exercise of martial law is unnecessary, it was argued, for, it was pointed out, it may often happen that courts, though open and undisturbed in the execution of their functions, may in fact be entirely unable to avert threatened danger, or to punish with adequate promptitude guilty conspirators. Especially in time of civil war, it was observed, the very judges and marshals of the courts may be in more or less active sympathy with the rebels.

It will be seen that, according to the reasoning of these justices, necessity is still the test by which is to be declared the legality of military acts when the citizen is thereby affected either in his person or property. But this necessity, it is argued, is one which it is the province of Congress conclusively to determine, the only limit upon its discretionary powers in this respect being that somewhere war must exist, to which the United States is a party. Whenever, then, such a war does exist, Congress, it was said, if it sees fit, so far as the judiciary may properly prevent, may at once suspend the writ of habeas corpus and generally supersede civil by military government throughout the length and breadth of the land. Its judgment, and not the actual facts of the case, is to determine the presence of that necessity which furnishes the justification for refusing to the individual that protection to his person and property which the civil law affords him.<sup>21</sup>

Furthermore these four justices asserted that the effect of a suspension of the privilege of the writ of habeas corpus is not simply to deny it to one held in custody, but affirmatively to authorize the executive to arrest as well as to detain.

As opposed to the position taken by these four justices, the majority of the court in the *Milligan* cases asserted, first, that no legislative fiat is sufficient to create, legally speaking, a necessity for the exercise of martial law when no such necessity in fact exists, and, second, that the circumstance that the ordinary courts are open and undisturbed in the execution of their functions is conclusive evidence of the fact that there is not present a necessity for martial law.

After stating the facts of the case, and declaring that no graver question than the one involved, no one which more nearly concerns the rights of the whole people, was ever before the court, the majority began their

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<sup>21</sup> The position of these four justices in the *Milligan* case is thus, in this respect, quite analogous to that originally taken by the Supreme Court in *Munn v. Illinois* (94 U. S. 113), but later abandoned, that the determination by the legislature of what is a reasonable rate to be charged for services by industries affected with a public interest is conclusively binding upon the courts.

argument by pointing out that the Constitution is a law for rulers and ruled in war as well as in peace, and that "no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." With war comes the necessity for the exercise of certain powers latent in the government, but in no case is there created a right upon its part to try and punish the citizen, charged with crime, in any other manner than that provided by law. The opinion continued:

"It is said that the jurisdiction [of the military commission] is complete under the 'laws and usages of war.' It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our National Legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress and not composed of judges appointed during good behavior. . . . It is claimed that martial law covers with its broad mantle the proceedings of this Military Commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

"If this position is sound to the extent claimed, then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed and certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of

Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish.

" . . . It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it would be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

"It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theater of military operations; and, as in this case, Indiana had been and was again threatened by invasion by the enemy the occasion was furnished to establish martial law. The con-



clusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law [*i. e.*, military laws governing war] cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

#### § 1051. Scope of *Milligan Case* Examined.

There would seem to be but little question that the doctrine stated by the majority in the *Milligan* case is essentially a sound one, namely, that actual necessity and not constructive necessity as determined by legislative declaration, alone will furnish justification for substituting martial for civil methods. It would seem, however, that in one respect the opinion is open to criticism. The statement is too absolutely made that "martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." It is correct to say that "the necessity must be actual and present," but it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly pointed out, there may be urgent necessity for martial rule even when the courts are open. The better doctrine, then, is, not for the court to attempt to determine in advance with respect to any one element, what does, and what does not create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption.

The English doctrine of martial law is substantially similar to this, and

an excellent illustration of the point under discussion is given by certain events growing out of the late British-Boer war.

During that struggle martial law was proclaimed by the British Government throughout the entire extent of Cape Colony, that is, in districts where no active military operations were being conducted and where the courts were open and undisturbed, but where considerable sympathy with the Boers and disaffection with the English rule existed. Sir Frederick Pollock, discussing the proper law of the subject with reference to the arrest of one Marais, upholds the judgment of the Judicial Committee of the Privy Council (A. C. 109, 1902) in which that court declined to hold that the absence of open disorder, and the undisturbed operation of the courts furnished conclusive evidence that martial law was unjustified.<sup>22</sup>

### § 1052. Powers and Responsibilities of Military Commander in Cases of Domestic Disorder.

It is to be observed, before leaving this point, that, so far as regards the legality of acts that may be done by military and civil authorities in effectuating their purposes, the necessity for them being present, there is no difference between the commander's powers in a domestic insurrection and in a war. There is, however, a vital distinction as to the power of the civil courts to question whether, in fact, such acts are justified by the necessities of the existing situation, and where such justification is found wanting to punish those committing them either civilly or criminally. As the Supreme Court of Pennsylvania in a leading case has said: "In truth he [the military agent] has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved."<sup>22a</sup>

A case which emphasizes the extent of the martial powers that may be exercised by the civil authorities of a State in times of emergency is that of *Moyer v. Peabody*.<sup>23</sup> Here an action was brought by the plaintiff in error against a former governor of a State, and other State officers for an imprisonment suffered under their orders at a time when considerable disorder existed, and when the country had been declared in a state of insurrection and the State troops had been called upon to assist the civil authorities in the maintenance of law and order. The Supreme Court in

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<sup>22</sup> *Law Quarterly Review*, XVIII, 152. For an opposite view, see *Edinburgh Review*, January, 1902.

<sup>22a</sup> *Commonwealth of Penna. v. Shortall* (206 Pa. 165).

<sup>23</sup> 212 U. S. 78.

its opinion, affirmed the order of the court below dismissing the complaint and affirmed the right of the civil authorities to make arrests, nor for purposes of punishment but to prevent the exercise of hostile acts, and said: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had no reasonable ground for his belief. If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end." The court added: "No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding that he had sole command at the time and acted to the best of his knowledge"; but, later on in the opinion, it is said: "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

It will be observed that in this case the court did not recognize a right upon the part of the military to establish courts for the trial and punishment of persons, but merely their right, as a preventive, precautionary, or police measure, to keep in custody, for the time being, persons who it was upon reasonable grounds believed were, by their actions, fomenting the disorder which the troops were endeavoring to put down. This detention was, therefore, essentially of the same nature as any other acts which the troops might take to the same end.<sup>24</sup>

Similar also to the holding of the Supreme Court in *Moyer v. Peabody*, was that of the Montana court in *Ex parte McDonald*.<sup>25</sup> In that case the court said: "It was distinctly asserted in the returns [to writs of habeas corpus] and established to our satisfaction by the evidence taken upon the hearing, that McDonald and his copetitioners had not been arrested, and were not held for trial before any court martial or other military tribunal, but that they had been arrested as leaders and inciters of the in-

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<sup>24</sup> Similar was the action of the Colorado Supreme Court in *Re Moyer* (35 Colo. 159). In that case the court said: "If . . . the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to."

<sup>25</sup> 49 Mont. 454; 143 Pac. Rep. 947.

surrection, and were being held as necessary measures for its suppression, to be turned over to the civil authorities for trial as soon as could safely be done. . . . We are convinced that the theory which accords the least power to the governor and to the militia in cases of insurrection is that he acts as a civil officer of the State, and that the military forces under him operate as a sort of major police for the restoration of public order; and we confidently assert that under this theory the arrest and detention, under the circumstances stated, can be justified, and must be upheld."

The holding in this case, and that of *Re Moyer* and *Ex parte McDonald*, referred to in the footnote, has been criticized by some, but in the author's opinion, unjustly. Open to objection, however, was the holding of the West Virginia courts in two cases which, though often classified with the Moyer cases, were essentially different from them in that, in those cases, the West Virginia court justified the military authorities, not merely in detaining persons as a precautionary measure, but in establishing courts for the trial of persons for offences ordinarily cognizable in civil courts, and, upon conviction, imprisoning them, not as a precautionary measure but for purposes of punishment.

However, although, in the opinion of the author, the Supreme Court was justified in its judgment in *Moyer v. Peabody*, the author is strongly of opinion that certain of the language of the court in that case was so unduly broad and unqualified as to make it possible to deduce from it a doctrine which, it may be confidently asserted, the Federal Supreme Court will not be willing to sanction.

In the well-considered case of *Franks v. Smith* <sup>26</sup> the Court of Appeals of Kentucky stated the relation of military to civil authorities, in times of domestic disorder, in language which, in the author's opinion, is much more satisfactory. In that case was contested the legality of an arrest, without authorization by the civil authorities, which had been made by members of the State militia which had been called out to control a condition of domestic disorder. To the contention that a member of the militia, when in active service, was not amenable to the civil authorities for acts committed in obedience to the orders of his military superiors, the court, while recognizing the constitutional right of the Governor of the State to call the militia to his aid in upholding the law and order of the State, when, in his judgment, he might deem it necessary or appropriate, declared that, when he does this, he acts in his capacity as a civil officer of the State and not as a military commander. "We have not, and cannot have, in this State a military force that is not and will not be subordinate to the civil authorities. The military cannot in any state of case take initiative or assume to do anything independent of the civil authorities. Ours is a

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<sup>26</sup> 134 Southwestern Rep. 484.

government of civil, not military, forces. The militia in active service and in every emergency that arises in such service is subordinate to the civil power. The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates."

The court then went on to declare that the military, acting as peace officers, have only those powers to arrest which are recognized by the civil law, common or statutory, and that, this being so, the arrests which they had made, being without such authorization, constituted torts against the parties arrested for which damages might be assessed.

In *State ex rel. Mays v. Brown*<sup>27</sup> and *Ex parte Jones*<sup>28</sup> the courts of West Virginia took a position, which, in the opinion of the author of this treatise, was an erroneous one, and which marks, perhaps, the extreme to which any of the courts of the United States have pushed the doctrine that there may exist in the States, in times of domestic disorder, a condition of veritable "war" which results in an abeyance, for the time being, of constitutional guarantees, and the exaltation, in effect, of the military above the civil authorities of the State, and this, despite the fact that the Constitution of the State expressly provided that "the military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State."<sup>29</sup>

In the first of the two cases above cited it was held by the court that persons not members of the military forces of the States might be tried and punished by a military commission appointed by the Governor, and authorized by him to sit in the territory in which domestic disorder existed or was threatened. In its opinion, the court treated the situation which had been created by the proclamation of the Governor that a state of war existed as one which authorized the same acts as are justified when a true state of public war exists and the regions in question are the theatre of active military operations. It was upon this basis that the case was decided. Specifically, the court held that, as one of the means for suppressing domestic disorder or insurrection it was defensible that the military authorities might arrest and detain persons charged with acts tending to promote the disorder or insurrection, even though those acts had been

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<sup>27</sup> 77 S. E. Rep. 243.

<sup>28</sup> 77 S. E. Rep. 1029.

<sup>29</sup> There was a statute of the State which provided that the Governor might declare a state of war in towns, cities, districts or counties in which invasion, insurrection, rebellion, or riot might exist. If this statute was intended to mean more than that the Governor might declare what is called martial law, and employ the militia in aid of the execution of the civil law, it was in plain violation of the State constitutional provision which has been quoted, and also, it would seem, in violation of the due process of law requirement of the Federal Constitution, and also, it may be, in violation of the requirement of the Federal Constitution with regard to the maintenance by the States of governments republican in form.

committed prior to the Governor's proclamation, and, further, that such detention could not be inquired into by habeas corpus proceedings by the civil courts. In this second respect the court went beyond the doctrine deducible from the language of the Supreme Court in *Moyer v. Peabody*,<sup>30</sup> and of the Colorado court in *Re Moyer*;<sup>31</sup> for the court held not only that, as a precautionary measure, persons, who it is believed may aid or encourage a disorder or an insurrection that is being suppressed, may be temporarily held in custody by the military authorities, but that such persons may be legally tried by military tribunals and sentenced to terms of imprisonment for offences ordinarily cognizable by the civil courts.

In the second of the West Virginia cases—*Ex parte Jones*<sup>32</sup>—the court reëxamined and reaffirmed without qualification the doctrine declared by it in *State ex rel. Mays v. Brown*. Indeed, the court declared that its conclusion as to the basic principles upon which that case had been rested had been strengthened and confirmed. One of these basic principles, and perhaps the chief of them, was that a state of veritable war can exist in a State in substantially the same sense that a public war can exist when the United States is contending with a foreign power or with a widespread rebellion against its authority, and, therefore, that, when a State of the Union employs its military forces for putting down domestic disorder or insurrection, its military officials may exercise the same powers which it has been recognized that the United States may employ. The court in the *Jones* case, said: "Since the Federal Constitution has not inhibited military government on the theatre of warfare in which the military power of the Federal Government is engaged, such government being, by necessary implication, contemplated and authorized by the Constitution itself, under such circumstances, no reason is perceived, nor has any been advanced in the argument in this case or any other, why military government in a State, justifiable upon the same ground of necessity, and by implication authorized by the State Constitution, should be regarded as a violation of the Federal Constitution. On the contrary, the Federal Supreme Court has itself, on more than one occasion, declared such State action not to be a violation of the National Constitution, nor of the guaranties of due process of law, trial by jury and the equal protection of the laws. Such is the effect of the decision in *Moyer v. Peabody*,<sup>33</sup> saying: 'Public danger warrants the substitution of executive process for judicial process.' " And, later, "By all authority the declaration of a state of insurrection or war by competent authority is conclusive upon the court."

It must be clear from the discussion which has gone before that the author of the present treatise is convinced that the position of the West Virginia court, in the cases which have been described, is an erroneous one.

<sup>30</sup> 212 U. S. 78.

<sup>31</sup> 35 Colo. 157; 85 Pac. Rep. 190.

<sup>32</sup> 77 S. E. Rep. 1029.

<sup>33</sup> 212 U. S. 78.

The source of its error is, essentially, the failure to distinguish between a state of public war and one of domestic disorder, and, coupled with this error, the failure to perceive that, from the very nature of the Federal Union and of the status of the individual States therein, it is not constitutionally possible for the States, as such, to wage war, or to recognize a state of war as existing. This is clearly stated in the able dissenting opinions filed in the two West Virginia cases by Judge Robinson.<sup>34</sup>

### § 1053. Liability of Soldiers Obeying Unjustified Commands of Their Superiors.

It is a general principle of American law that a subordinate cannot escape from civil or criminal liability for illegal acts upon his part by pleading that they were committed under authorization by, or in pursuance, of a command by an administrative or executive superior.<sup>35</sup> Upon the other hand, it is an equally imperative principle of military law that a subordinate shall render immediate obedience to a command of his military superior, failing which he is subject to summary punishment at the hands of the military authorities. There is thus presented the question as to what civil or criminal liability is incurred by a military subordinate who acts in obedience to a command of his military superior which that military superior is not legally authorized to give or is not justified in giving by the circumstances of the situation. This question has been earlier referred to in Section 919, but it is necessary here to consider it in more detail.

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<sup>34</sup> In his dissenting opinion, in the second case, Judge Robinson said: "A clash between mine owners and miners cannot be considered public war and the participants dealt with as enemies of the State. . . . Yet the majority opinion deals with the citizens of the district as rebels. It deals with a part of Kanawha county as enemy country. . . . The failure in the majority opinion to observe the sharp distinction between public war and civil disorder; between enmity against the State and individual enmity between citizens of the State; between rebels and mere violators of the law; between belligerent territory and territory retaining allegiance,—accounts for the misapplication of decisions, legislative enactments, and quotations relied on therein. An examination of those decisions, enactments, and quotations with this distinction in view will show how inapplicable they are. They relate to public war and to public enemies. We are not dealing with public war or with public enemies."

It is to be observed with reference to the conditions in West Virginia, out of which arose the cases which have been discussed, that there was no claim that there was a rebellion against the State in the sense that an attempt was being made by those resisting the enforcement of its laws to withdraw their political allegiance from the State or to overthrow by illegal means its Government. There was, therefore, all the more reason why it was not proper to argue from the acts upon the part of the United States during the Civil War that the acts committed in the premises by the State of West Virginia were legal.

For a recent general discussion of martial law, see the article by Charles Fairman entitled "The Law of Martial Rule" in 22 *Am. Political Science Review*, 591.

<sup>35</sup> The same is, of course, true when justification is sought under an unconstitutional legislative authorization.

The courts are divided in the answer which they have given to this question. Some of them have held the subordinate to strict accountability, notwithstanding the apparent injustice of so doing, perhaps relying upon executive pardons, or legislative reimbursements of fines or civil damages paid, for the conviction of the injustice. Other courts, in order to meet the equities of the cases, have modified the rule of strict liability to the extent of holding that the subordinate is not to be held responsible when carrying out the command of his military superior when he has had no reasonable grounds for believing that his superior was acting in excess of his legal authority or without justification for the command given by him.

In general, it may be said that the courts have inclined towards this second and less rigorous doctrine even though it has meant a violation of legal logic, that is, the refusal to apply an acknowledged general principle of the civil law.<sup>36</sup> A leading case in support of this milder rule is that of Commonwealth of Pennsylvania *ex rel.* Wadsworth v. Shortall.<sup>37</sup> That case was a habeas corpus proceeding for the release of the petitioner who, acting under orders of his military superior, had shot and killed a person who, it developed, had been innocent of any unlawful intent. The petitioner had been arrested and held upon a charge of manslaughter. The court discharged the petitioner upon the ground that the act charged against him was one which the undisputed facts showed he had legal justification to do. It is the author's opinion that, in so holding, the court went further than was necessary. It would seem that, in such cases, the killing being *prima facie* a criminal act, the question should go to a jury whether, in view of all the circumstances of the case, there was reasonable ground for the opinion upon the part of the accused that the orders given to him by his military superior were within that superior's official authority, and were reasonable in character, and, further more, that, under the instant circumstances, the accused had reasonable grounds for believing that what he did was required by the commands which he had received. Instead of this, the court expressed its own opinion upon these points, and, answering the questions in the affirmative, said: "If the case was before a jury, we should be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him [the relator] to trial and he is accordingly discharged."

It should be noted, in support of the propriety of the court's action in this case, that the case was before it on a writ of habeas corpus which had been sued out prior to indictment, and, therefore, the court was justified in examining into the entire merits of the case.

In McCall v. McDowell<sup>38</sup> the court said: "Except in a plain case of ex-

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<sup>36</sup> 40 *Corpus Juris*, 707 (*sub. nom.* "Militia").

<sup>37</sup> 206 Pa. 165.

<sup>38</sup> 15 Fed. Cas. No. 8673.



cess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I can not but think that the law should excuse the military subordinate when acting in obedience to the order of his commander." And in *Re Fair* <sup>39</sup> we find the court saying: "The law is that an order given by an officer to his private, which does not expressly or clearly show on its face its illegality, the soldier is bound to obey; and such order is his full protection." <sup>40</sup>

**§ 1054. How Far a Legislature May, by Subsequent Enactment, Protect Military Officials against Prosecution for Acts Illegal when Committed.**

In 1863 Congress passed an act for the protection of military persons against suits for certain acts done by them during the war without authority of law.<sup>41</sup> The fourth section of this law read:

"And be it further enacted, that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue." <sup>42</sup>

There would seem to be great doubt as to the unconstitutionality of this law, should it be interpreted in as wide a sense as its language permits; for, giving to its words the full meaning which they are capable of bearing, they assert the power of the legislature to justify acts of military officers which Congress could not constitutionally have authorized by prior legislation.

The validity of this act was questioned in the case of *Mitchell v. Clark*.<sup>43</sup> In this case the plaintiff sued the defendant for rent due on a lease of certain warehouses. The defendant, admitting the lease, set up that the rent in question had been paid by him, under military orders, to certain military officials, and by them confiscated for the use of the United States. Whether or not this payment by the defendant constituted a payment of the rent due of course depended upon the lawfulness of its confiscation by the military authorities, which in turn depended upon the validity of the act of Congress of 1863. In upholding the potency of the act to legitimize the confiscation, the Supreme Court said:

"That an act passed after the event, which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting

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<sup>39</sup> 100 Fed. Rep. 149. See *United States v. Lipsett* (156 Fed. Rep. 71).

<sup>40</sup> See also *United States v. Lipsett* (156 Fed. Rep. 71).

<sup>41</sup> 12 Stat. at L. 755.

<sup>42</sup> By act of May 11, 1866, this provision was given still wider application.

<sup>43</sup> 110 U. S. 633.

under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt."

There can be no objection to this statement that Congress, after an event, has the power, by an act of indemnity, to declare that no suit shall be based upon an act which it might have at the time authorized. This, it has been claimed, is all that that case decided.<sup>44</sup> It would seem to the author, however, that a broader and more questionable doctrine was necessarily involved, in that, in a loyal State, removed from the seat of active hostilities, the court justified, not upon the basis of necessity, but of legislative sanction, an act of spoliation.<sup>45</sup>

The constitutional power of a legislature to enact curative measures which will protect public officials against prosecution for acts illegal when committed by them under color of official authority, and which the legislature might have constitutionally rendered legal, is well established. A fairly recent holding to this effect is that of the Supreme Court in *Tiaco v. Forbes*.<sup>46</sup> In this case Governor-General Forbes, acting in his official authority, had authorized the deportation of an alien from the Philippine Islands. It appeared that the Governor had not legal authority to do this, but, by subsequent enactment, the Philippine legislature ratified his act. The Supreme Court held this enactment adequate to protect him against personal liability in the courts even though, at the time of the enactment, suits were pending to make him answerable in damages.<sup>47</sup>

Certain of the States have, by statute, sought to protect soldiers from civil and criminal actions based upon acts done by them in active military service and in pursuance of duty. Thus a Minnesota statute of 1913<sup>48</sup> declares: "The commanding officer of any militia force engaged in the suppression of an insurrection, the dispersion of a mob, or the enforcement of the laws shall exercise his discretion as to the propriety of firing upon or otherwise attacking any mob or other unlawful assembly; and, if he exercise his honest judgment thereon, he shall not be liable in either a civil or a criminal action for any act done while on such duty."

### § 1055. Habeas Corpus.

The writ of habeas corpus *ad subjiciendum* is one of a number of so-called extraordinary judicial writs, which, like those of certiorari, quo warranto,

<sup>44</sup> C. N. Lieber, "The Justification of Martial Law," in the *North American Review*, 1896.

<sup>45</sup> See dissenting opinion of Justice Field and the comments of Hare in his *American Constitutional Law*, pp. 972 *et seq.*

<sup>46</sup> 228 U. S. 549.

<sup>47</sup> Language was used by the court which indicates that the Governor-General's act was viewed as an "Act of State." Unless a very broad definition is given to that term, it is difficult to see how the Governor General's act could be brought within its scope, for, used as a technical term, it applies only to acts committed by a public official outside the territorial jurisdiction of the State and against an alien. See *ante*, § 917.

<sup>48</sup> General Statutes, 1913, Sec. 2379.

mandamus and injunction are issued by the courts in order either that their commands may be executed, or that a matter may be brought before them for judicial determination. This especial writ, often termed "the writ of liberty," had become one of the established rights of the citizen before the separation of the American colonies from the mother country, and has ever since been regarded by American citizens as the greatest of the safeguards erected by the civil law against arbitrary and illegal imprisonment by whomsoever the detention may be exercised or ordered. Issued as of right (*ex debito justitiæ*)<sup>49</sup> by any court of competent jurisdiction, it orders those to whom it is directed to show good legal justification for holding in custody the person in whose favor it is given. Where such sufficient cause is not shown, an order of release follows as of course.<sup>50</sup>

### § 1056. Suspension of the Writ.

The United States Constitution declares that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."<sup>51</sup> The implication from this language is that the writ shall not be suspended, except in the cases mentioned. The prohibition is directed only to the Federal Government. Aside, therefore, from the specific provisions of their several Constitutions, the States are free to suspend the writ, but in case they do so and without sufficient excuse, the person detained may, of course, obtain the writ from a Federal court under the claim that he is deprived of liberty without due process of law, or in derogation of some other Federal right, privilege or immunity.

The suspension of the privilege of the writ, it is to be observed, does not deprive the courts of the right to issue it. It furnishes merely a legal ground for a refusal to obey it.<sup>52</sup>

Furthermore, the suspension of the writ goes no further than to justify this refusal. It thus enables executive agents to make arrests at will, and, while the suspension is in force, renders it impossible for those apprehended to obtain a judicial judgment upon the legality of such arrests and detention. But it does not operate actually to authorize such arrests,<sup>53</sup> or to deprive the individual of any of the other rights which the law secures him, and, therefore, the persons responsible for the arrests and detention may still be held civilly and criminally responsible for any illegal acts that they may have committed. In time of war, or of domestic insurrection or

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<sup>49</sup> But not as of course, for the petition must set out a cause for its issuance.

<sup>50</sup> The jurisdiction of the Federal courts with reference to the issuance of the writ has been considered in an earlier chapter.

<sup>51</sup> Art. I, Sec. 9, Cl. 2.

<sup>52</sup> *Ex parte Vallandigham* (1 Wall. 243).

<sup>53</sup> The four minority justices in the *Milligan* case asserted, though it would seem improperly, that the suspension of the writ does have this effect.

disorder, when so-called martial law has been declared, the privilege of the writ of habeas corpus, together with all the other civil guarantees may, for the time being, be suspended; but, as we have already learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this.

The existence of civil war operates as regards the enemy *ipso facto*, that is, without formal declaration, as a suspension of the privilege of the writ of habeas corpus, together with, as said, the suspension of the other guarantees to the individual against arbitrary executive action. In the preceding chapter the principle is argued that the establishment of martial law may properly take place not only upon the theater of active hostilities, but elsewhere when the actual necessities of the case demand it.

The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law. The same reasoning, therefore, that was employed with reference to this latter subject is applicable to the question of the suspension of the writ of habeas corpus, and need not here be repeated.

#### § 1057. Power of the President to Suspend the Writ.

In *Ex parte Bollman* <sup>54</sup> the Supreme Court in its opinion took for granted that the power of suspension lay with Congress, and the same view was held by Story in his *Commentaries*.<sup>55</sup>

In the *Bollman* case Marshall said: "If at any time the public safety should require the suspension of the powers vested by this act [granting jurisdiction] in the courts of the United States, it is for the legislature to say so. The question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, this court can only see its duty and must obey the laws."<sup>56</sup>

The correctness of this view does not appear to have been questioned

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<sup>54</sup> 4 Cr. 75.

<sup>55</sup> § 1336. Story says: "Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."

<sup>56</sup> Randall, in his *Constitutional Problems Under Lincoln* (p. 133) argues that what the Supreme Court had to decide in the *Bollman* case, was, not as to whether the Congress or the President had the right to suspend the writ, but whether the court, under the Judiciary Act of 1789, had the authority to withhold the writ under the circumstances of the case, and therefore, that what Marshall meant, when he said that if the writ was to be suspended it was for Congress to say so, was that if the courts were to have the right to withhold the writ it was for Congress by statute to say so.

This point is probably well taken, but the fact is that the *Bollman* case has been held to declare the doctrine that the constitutional right to suspend the writ lies with Congress, and it is so cited by Chief Justice Taney in the *Merryman* case.

until the early period of the Civil War, when President Lincoln, upon the advice of his Attorney-General, declared that the power lay with him, and by various proclamations authorized the suspension of the writ in places both within and without the area of active hostilities.<sup>57</sup>

The rightfulness of this assumption of power by the President was severely criticized notwithstanding the arguments of the Attorney-General and of the eminent jurist Horace Binney. This criticism was judicially expressed by Chief Justice Taney in a protest which he filed in the case of *Ex parte Merryman*.<sup>58</sup>

In that case obedience to a writ which he had issued being refused by a military officer of the United States, acting under the authority of the President, Taney recognized his inability to compel its execution and filed a protesting opinion in the course of which, after calling attention to the fact that the constitutional provision providing for the suspension of the writ is found in the article which is devoted to the legislative department and is, therefore, to be presumed to relate to the powers of Congress, he said: "The only power, therefore, which the President possesses, where the 'life, liberty or property' of a private citizen are concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the coordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come to the aid of the judicial authority if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm. But in exercising this power he acts in subordination to judicial authority, assisting it to execute the process and enforce its judgments.

"With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus or arrest a citizen except in aid of the judicial power. He certainly does not faithfully execute the law if he takes upon himself legislative power by

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<sup>57</sup> For an able argument sustaining this position, see the three pamphlets issued in 1862, 1863 and 1865 by Horace Binney, entitled "The Principles of the Writ of Habeas Corpus." For other discussions see the article by Joel Parker, entitled "Habeas Corpus and Martial Law," in the *North American Review*, October, 1861; that by S. G. Fisher in the *Political Science Quarterly*, Vol. III, p. 454, entitled "The Suspension of Habeas Corpus during the War of the Rebellion" (criticizing Binney); the pamphlet "Executive Power," by B. R. Curtis, reprinted in the second volume of his *Life*, and also in the second volume of Curtis' *Constitutional History of the United States* (ed. 1896).

<sup>58</sup> Taney's Reports, 246.

suspending the writ of habeas corpus, and the judicial power also by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted."

That Taney's reasoning is correct there would now seem to be little question. The point has never been since squarely passed upon by the courts, but in 1863 Congress considered it necessary specifically to authorize the President to suspend the writ, and commentators now agree that the power to suspend or authorize the suspension lies exclusively in Congress. Winthrop in his *Military Law*, summing up his review of the subject, says: "Thus, as a general principle, it may be deemed settled by the rulings of the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the writ of habeas corpus, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress." <sup>59</sup>

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<sup>59</sup> See also especially the argument by Tucker in his *Constitution of the United States*, II, pp. 642-652.

## CHAPTER LXXXVIII

### THE SEPARATION OF POWERS

#### § 1058. The Separation of Powers.

A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government. The value of this principle or practice in protecting the governed from arbitrary and oppressive acts on the part of those in political authority, has never been questioned since the time of autocratic royal rule in England. That the doctrine should govern the new constitutional system established in 1789 was not doubted. Washington, in his farewell address, said: "The spirit of encroachment tends to consolidate the powers of all governments in one, and thus to create, whatever the form of government, a real despotism." Madison, in *The Federalist*,<sup>1</sup> wrote: "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." John Adams<sup>2</sup> wrote: "It is by balancing one of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved;" and Hamilton asserted: "I agree that there is no liberty if the powers of judging be not separated from the legislative and executive powers."<sup>3</sup> Webster stated the same doctrine when he said: "The separation of the departments [of government] so far as practicable, and the preservation of clear lines between them is the fundamental idea in the creation of all of our constitutions, and doubtless the continuance of regulated liberty depends on maintaining these boundaries."<sup>4</sup>

Under the influence of this doctrine most of the States in their first Constitutions incorporated what have since been known as "distributing clauses." Thus Massachusetts in her Constitution, adopted in 1780, provided that "in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or

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<sup>1</sup> No. 47.

<sup>2</sup> *Works*, I, 186.

<sup>3</sup> *Federalist*, No. 48.

<sup>4</sup> For these and other quotations see the valuable work of Dr. Bondy, *The Separation of Powers*.

either of them; the executive shall never exercise legislative and judicial powers or either of them; the judicial shall never exercise legislative and executive powers or either of them; to the end that it may be a government of laws and not of men." Maryland in her first instrument of government declared "that the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other," and New Hampshire provided that "the legislative, executive and judiciary powers ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."

In practically all of the State constitutions which have been adopted since the revolutionary period there have been either distributing clauses similar to those given, or express provision that the legislative shall be vested in the legislature, the judicial in the courts, and the executive in the executive organs therein created. A number of constitutions, however, are careful to state that the principle of absolute separation is not to apply in those cases in which express provision otherwise is made.

#### **§ 1059. Separation of Powers in the States Not Compelled by the Federal Constitution.**

It is to be observed that this general acceptance by the States of the principle of the separation of powers is not one forced upon them by Federal law,<sup>5</sup> except in so far as the prohibition of the Fourteenth Amendment with reference to the depriving any person of life, liberty, or property without due process of law is operative or possibly, in extreme cases, where it might be held that the government is not republican in form. Nor, as we shall later see, do the distributing clauses in the State Constitutions operate to prevent the consolidation of judicial, executive, and legislative powers in local government organs.<sup>6</sup>

#### **§ 1060. Powers Separated in the Federal Government.**

The Federal Constitution does not contain a specific distributing clause, but its equivalent is found in the clauses which provide that "all legislative powers herein granted shall be vested in a Congress of the United States," that "the executive power shall be vested in a President of the United States of America," and that "the judicial power of the United States shall

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<sup>5</sup> For an early statement of this see *Calder v. Bull* (3 Dall. 386). In *Prentiss v. Atlantic Coast Line Co.* (211 U. S. 239), the court said: "We shall assume that when, as here, a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned." See also *Dreyer v. Illinois* (187 U. S. 713).

<sup>6</sup> Cf. Goodnow, *American Administrative Law*, p. 35.



be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

These provisions interpreted in the light of the accepted doctrines that each and all of the Federal organs of government possess only those powers granted them by the Constitution, and that the powers not granted may not by them be delegated to other and different organs, have, from the beginning, been held to secure what the specific distributing clauses in the State Constitutions are designed to provide. In the case of *Kilbourn v. Thompson*<sup>7</sup> the court said: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of that system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system that the persons intrusted with the power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no others."<sup>8</sup>

To preserve the separation of powers and to render government efficient for the protection of civil liberty, the framers of our Federal and State Constitutions saw that it was necessary not simply to create separate depositories for the three powers, but to provide means for preventing, if possible, the control by one department of the other departments. With this end in view the executive, legislative and judicial establishments were made as independent as possible of one another. Thus the legislatures are made the sole judges as to the constitutional qualifications of those claiming membership, they have the power of disciplining and expelling members, their members are in general not liable to arrest except for felony, treason or breach of the peace, and they may not be held responsible in actions of slander or libel for words spoken or printed by them as members. The independence of the courts is in general secured by tenures of office, and official compensation free from legislative control, and, furthermore, they have the great power of declining to enforce all laws or executive acts which they hold to be unconstitutional or otherwise illegal. The executive has, of course, within his own hands, the material force of the State, and within the limits of the discretion placed by law within his hands, may not be held legally responsible in the courts for his acts.

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<sup>7</sup> 103 U. S. 168.

<sup>8</sup> The principle of the separation of powers does not limit Congress when providing governments for the Territories, for, as to this, Congress has complete discretion.

**§ 1061. Separation of Powers Not Complete.**

While, as has been said, the principle of the separation of powers has generally been accepted as binding in our systems of constitutional jurisprudence—State and National—the practical necessities of efficient government have prevented its complete application. From the beginning it has been necessary to vest in each of the three departments of government certain powers which, in their essential nature, have not belonged to it. Thus, to mention only a few of the more evident examples, the courts have been given the essentially legislative power to establish rules of practice and procedure, and the executive power to appoint certain officials—sheriffs, criers, bailiffs, clerks, etc.; the executive has been granted the legislative veto power, and the judicial right of pardoning; the legislature has been given the judicial powers of impeachment, and of judging of the qualifications of its own members, and the Senate, the essentially executive power of participating in the appointment of civil officials.

Not only this, but as we shall later see, the principle of the separation of powers does not prevent the legislative delegation to executive officers of both a considerable ordinance-making power, and an authority to pass, with or without an appeal to the courts, upon questions of fact. Essentially, the promulgation of administrative orders or ordinances is legislative in character, and the determination of facts after a hearing is judicial. In both cases, however, these functions are performed in pursuance of statutory authority, and as incidental to the execution of law. In like manner, the legislature is conceded to have, as incidental to its law-making power, the essentially judicial function of punishing for contempt in certain classes of cases. It should, perhaps, be observed that inquiries as to the essential or inherent nature of specific powers are of so speculative a character that the courts in many cases have preferred to seek the guidance of historical precedent or of considerations of political expediency rather than the conclusions to be reached by pure reason. At times, however, the courts have been compelled to rely this last source for their determinations.

**§ 1062. The General Principle Stated.**

Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.

From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend

upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given.

Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.

### § 1063. Distinction Between Legislative and Judicial Acts.

In a dissenting opinion rendered in the *Sinking Fund* cases <sup>9</sup> Justice Field said: "The distinction between a judicial and legislative act is well defined. The one determines what the law is, and what rights the parties have with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is, to that extent, a judicial one, and not the proper exercise of legislative functions."

In *Taylor v. Place* <sup>10</sup> the court said: "The judicial power is exercised in the decision of cases; the legislature in making general regulations, by the enactment of laws. The latter acts from consideration of public policy; the former is guided by the pleadings and evidence in the cases."

In *Prentiss v. Atlantic Coast Line Co.* <sup>11</sup> the court said: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

In further distinction of the two functions it may be added that legislative action is initiated by the enacting body, whereas the judiciary may act only when called upon to do so, and that the former acts upon its own knowledge, the latter upon knowledge given to it. <sup>12</sup>

### § 1064. Declaratory and Retroactive Legislation.

The foregoing distinctions support the doctrines that have been established with reference to the legislative enactment of declaratory and retroactive statutes.

Declaratory statutes, that is, those legislative pronouncements as to how certain laws, previously established, are to be interpreted in courts and by executive agents, are valid only in so far as they are designed to

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<sup>9</sup> 99 U. S. 700.

<sup>10</sup> 4 R. I. 324.

<sup>11</sup> 211 U. S. 210.

<sup>12</sup> Cf. a paper entitled "The Distinction between Legislative and Judicial Functions," in *Report of the American Bar Association*, 1885, p. 261.

govern future action. Cooley states the law upon this point as follows: "If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and can not be done by a mandate to the courts which leaves the law unchanged, but seeks to compel the courts to construe and apply it not according to the judicial, but according to the legislative judgment.

"But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous and suitable that could have been adopted." <sup>13</sup>

"If," continues Cooley, "the legislature can not thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it can not do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry."

Retroactive legislation which does not impair vested rights, or violate express constitutional prohibitions, is valid, and, therefore, particular legal remedies, and, to a certain extent, rules of evidence, may be changed and, as changed, made applicable to past transactions, for it is held that, so long as the general requirements of due process of law are satisfied, no person has a vested right in any particular legal remedy or mode of judicial procedure.

Again, in certain cases, the legislature is competent to validate proceedings otherwise invalid because of formal irregularities. But substantial rights may not thus be interfered with. To quote again from Cooley: "The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and, for the same reason it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties." <sup>14</sup>

In *Mitchell v. Clark* <sup>15</sup> was involved the constitutionality of a statute of

<sup>13</sup> *Constitutional Limitations*, 7th ed., p. 137.

<sup>14</sup> *Op. cit.* 150.

<sup>15</sup> 110 U. S. 633. See also *Tiaco v. Forbes* (228 U. S. 549).

1863, by which Congress had declared: "That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any such seizure, arrest or imprisonment, made, done or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea or under the general issue;" and "That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespass or wrongs done or committed, or act omitted to be done, at any time during the present rebellion by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress unless the same shall be commenced within two years next after such arrest, imprisonment, trespass or wrong may have been done or committed, or act may have been omitted to be done."

Notwithstanding the very broad language of this act of immunity, the constitutionality of the measure was sustained. The court was, however, careful, in its opinion, to restrict its operation to the validation only of acts that it might have been possible for the President or Congress to have authorized at the time they were committed. Thus the opinion declared: "That an act passed after the event, which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires." It should be observed that the acts of executive officials whose illegality may be cured by subsequent legislation must be ones committed in the course of, and under color of, official authority.

### **§ 1065. Legislative Control of Judicial Procedure and Powers.**

The power of the courts to refuse to apply legislative acts inconsistent with constitutional provisions has already been considered. This is as far as the courts will go in the control of the legislative department. They do not possess and have never claimed to possess the power to pass upon the credentials of one claiming membership in a legislative body. They do not attempt to prescribe the rules by which such bodies are governed in the conduct of their work, and, to only a very limited extent, will they question the correctness of the legislative records that are kept. Finally, they never attempt to command or to prohibit the performance of a legislative act. Individually, however, the members of a legislature are, of course, subject to judicial process, except so far as they have been granted express immunity by the Constitution.

Upon the other hand, as we shall see, the courts have not hesitated to protect their own independence from legislative control, not simply by refusing

to give effect to retroactive declaratory statutes, or to acts attempting the revision or reversal of judicial determinations, but by refusing themselves to entertain jurisdiction in cases in which they have not been given the power to enforce their decrees by their own writs of execution. Thus, as already mentioned, they have refused to act where their decisions have been subject to legislative or administrative revisions. Finally, even where the extent of their jurisdiction, as to both parties litigant and subject-matter, has been subject to legislative control, the courts have not permitted themselves to be deprived of the power necessary for maintaining their dignity, the orderly course of their procedure, and the effectiveness of their writs.

In order that the court may perform its judicial functions with dignity and effectiveness, it is necessary that it should possess certain powers. Among these is the right to issue certain writs, called extraordinary writs, such as mandamus, injunction, certiorari, prohibition, etc., and, especially, to punish for contempt any disobedience to its orders. The possession of these powers the courts have jealously guarded, and in accordance with the constitutional doctrine of the separation and independence of the three departments of government, have held, and undoubtedly will continue to hold, invalid any attempt on the part of the legislature to deprive them by statute of any power the exercise of which they deem essential to the proper performance of their judicial functions. The extent of their jurisdiction, they argue, may be more or less within legislative control, but the possession of powers for the efficient exercise of that jurisdiction, whether statutory or constitutional, which they do possess, they cannot be deprived of.

#### **§ 1066. Jurisdiction and Judicial Power Distinguished.**

It has been already pointed out that the jurisdictions of the inferior Federal courts and the appellate jurisdiction of the Supreme Court are wholly within the control of Congress, depending as they do upon statutory grant. It has, however, been argued that while the extent of this jurisdiction is thus within the control of the legislature, that body may not control the manner in which the jurisdiction which is granted shall be exercised, at least to the extent of denying to the courts the authority to issue writs and take other judicial action necessary for the proper and effective execution of their functions. In other words, the argument is, that while jurisdiction is obtained by congressional grant, judicial power, when once a court is established and given a jurisdiction, at once attaches by the direct force of the Constitution.

This position was especially argued by Senators Knox, Spooner and Culberson and contested by Senator Bailey during the debate upon the Hepburn Railway Rate Bill of 1906. The point at issue was the constitutionality of the amendment offered by Senator Bailey providing that no rate or charge, regulation or practice, prescribed by the Interstate Commerce Com-

mission, should be set aside or suspended by any preliminary or interlocutory decree or order of a circuit court.<sup>16</sup>

This position would seem to be well taken, and would apply to attempts upon the part of Congress to specify the classes of statutes whose constitutionality may be questioned by the courts, or to declare the number of justices of the Supreme Court who will be required to concur in order to render a judgment declaring the unconstitutionality of an act of Congress.<sup>17</sup>

### § 1067. Declaratory Judgments.

Elsewhere in this treatise<sup>18</sup> is discussed the propriety of the practice of the Federal courts of testing the constitutionality of State statutes by means of injunction proceedings against the State officials charged with the execution of such statutes. It will there be seen that this practice, under certain circumstances, has been upheld. However, the Supreme Court has not allowed this to be done except (1) when, as has been earlier said, the penalties imposed by the statutes for refusal to obey them are so severe as to make it unjust to ask that they be risked by the person who may, by his

<sup>16</sup> An interesting discussion of this point is that by Mr. J. W. Bryan in the *American Law Review*, XLI, 51, in an article entitled "The Constitutional Aspects of the Senatorial Debate upon the Rate Bill." Mr. Bryan's conclusion, which seems an eminently satisfactory one, is that while Congress may, within its discretion, refuse to the inferior Federal courts jurisdiction, it cannot compel them to administer a judicial power from which any essential elements have been abstracted; and, therefore, in each case, it is open to the court to refuse to proceed in suits where, in its opinion, it has been denied by Congress sufficient authority and power to give the parties litigant due process of law; that is, adequately to protect their rights and enforce the judgments or decrees that may be rendered.

In *State v. Morrill* (16 Ark. 384) the Supreme Court of Arkansas declared: "The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American People. As far as the act in question goes, in sanctioning the power of the courts to punish as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded no more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to say that it is absolutely binding upon the courts, would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the General Assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt." To same effect is *Carter v. Com. of Va.* (96 Va. 791).

<sup>17</sup> See *ante*, § 25.

<sup>18</sup> Chapter LXXVII, "The Suability of States."

refusal to obey, desire to test the validity of the statutes, or, (2) when substantial interests of the petitioners for the injunction are directly and imminently threatened. When this is not the case, the court has considered that the proceedings are to obtain "declaratory" judgments upon its part—which class of judgments it has consistently declined to give.

Thus, in *Massachusetts State Grange v. Benton*<sup>19</sup> in which a bill had been brought by various parties to restrain officials of the State from putting into effect certain so-called "Daylight Saving Acts" with regard to public schools and other institutions of the State, and with regard to contracts made or choses in action to be performed in the State, the court, after emphasizing its rule that injunctions would be issued against officers of a State clothed with authority to execute laws only in cases "reasonably free from doubt and when necessary to prevent great and irreparable injury," declared that no such necessity was shown in the instant case. Justice Reynolds in a concurring opinion said: "The bill discloses a bold purpose to secure an adjudication in respect to the constitutionality of a State statute. In no just sense did it seek protection of any property right threatened with unlawful invasion by an officer claiming to proceed under a void enactment."

In *Liberty Warehouse v. Grannis*,<sup>20</sup> the court affirmed the judgment of the court below dismissing, for want of jurisdiction, a petition for a declaration of rights under a Declaratory Judgment Law of Kentucky.<sup>21</sup> In 1924 the State had enacted a law requiring certain action upon the part of tobacco warehouses under penalty of fine of \$50 to \$100 a day for violations of it. The petitioning tobacco warehousemen had prayed the court "by its judgment to declare what their rights and duties under said act of 1924 are, and that a judgment be rendered declaring said act of 1924 invalid, and for all other proper relief." The Supreme Court said: "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And

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<sup>19</sup> 272 U. S. 525.

<sup>20</sup> 273 U. S. 70.

<sup>21</sup> The action had been brought against the State's Attorney for one of the judicial districts of the State.



no relief of any kind is prayed against him, by restraining action on his part or otherwise.

"The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court."

After citing earlier cases, and quoting at length from *Muskrat v. United States*, the court continued: "It follows necessarily from these decisions that the District Court as a court of the United States established under Article 3 of the Constitution, had no jurisdiction to entertain the petition for the declaratory judgment. Manifestly the Federal Conformity Statute conferred upon the court no jurisdiction to proceed in accordance with the Declaratory Judgment Law of Kentucky. This statute relates only to 'practice, pleadings, and forms and modes of proceeding;' and neither purports to nor can extend the jurisdiction of the district courts beyond the constitutional limitations."<sup>22</sup>

In *Fidelity National Bank and Trust Co. v. Swope*<sup>23</sup> was involved the question whether certain proceedings, authorized by a State statute under which the State courts, at the instance of the city, had determined the validity and the assessments thereunder, of an ordinance authorizing an improvement, fixing the limits of a benefit district, and apportioning benefits, constituted a "case" or "controversy," which might be entertained by the Federal courts. Justice Stone, speaking for a unanimous court, said: "That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned (citing *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378). They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city. . . . While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Naturalization proceedings, (*Tatun v. United States*, 270 U. S. 568); suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will, (*Traphagen v. Levy*, 45 N. J. Eq. 448); bills of interpleader, so far as the stakeholder is concerned, (*Wakeman v. Kingsland*, 46 N. J. Eq. 113); bills to quiet title where the plaintiff rests his claim on adverse possession, (*Sharon v. Tucker*, 144 U. S. 533); are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary

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<sup>22</sup> Citing *Southern Pacific Co. v. Denton* (146 U. S. 202); and *Mexican Central Ry. v. Pinkney* (149 U. S. 194).

For a criticism of the decision in this case, see 36 *Yale Law Journal*, 845.

<sup>23</sup> 274 U. S. 123.

to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. . . . The plain effect of these provisions [of the Missouri statute] is to authorize the court to examine and determine the validity and effect of the legislative action in establishing the benefit district. The result of the proceeding is to establish judicially as against the property owners in the district the validity of such action and of the liens established or to be established conformably to the statute on the specific property described. The issues presented and the subject matter are such that the judicial power is capable of acting upon them. There is no want of adverse parties necessary to the creation of a controversy as in *Muskrat v. United States*, 217 U. S. 346. The judgment is not merely advisory as in *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70; *New Jersey v. Sargent*, 269 U. S. 328; *Fairchild v. Hughes*, 258 U. S. 126; *Massachusetts v. Mellon*, 262 U. S. 447; *Texas v. Interstate Commerce Commission*, 258 U. S. 158. It operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings. So far as it affects owners of land in the benefit district who are citizens of other States, the controversy is a 'suit' which may be removed to the Federal courts."

As to the last case it is to be observed that it was not brought by the city simply and solely to determine the validity of the ordinance involved, but to fix and determine also the validity of specific assessments that had been made and were to be made upon specific pieces of property, and, therefore, the validity of the resulting liens upon such properties. However, in that case, the court was not asked to issue any judgments against such properties or their owners.

In *Gordon v. United States*,<sup>24</sup> as has been elsewhere noted <sup>25</sup> the Supreme Court declined to entertain appeals from judgments of the Court of Claims under the statute as it then existed which left to Congress the discretionary power to appropriate or to refuse to appropriate moneys for the payment of such judgments as might be rendered. The Supreme Court said: "The award or execution is a part and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter." And later: "It is true the act speaks of the judgment or decree of this court. But all that the court is authorized to do is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates and Congress sanctions it by an appropriation, it is then to be paid out but not otherwise. And when the Secretary asks for this appropriation, the propriety of the estimate for the claim, like all other estimates of the Secretary, will be opened to debate,

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<sup>24</sup> 2 Wall. 561.

<sup>25</sup> See § 788.

and whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the legislative department, and not by that department to which the Constitution has confided it."

Examining the foregoing cases it is seen that two tests have been stated as to the judicial character of action asked of a court: First, that execution upon the order of the court of the judgment or decree that may be rendered is possible; and second, that the parties litigant will be conclusively bound by such final judgment or decree. As regards the first of these it is admitted that it need not be always present; that is, that there are classes of cases, essentially judicial in character, such as those mentioned by the court in *Fidelity National Bank and Trust Co. v. Swope*<sup>26</sup> in which judgments or decrees are entered upon which no writs of execution are required or expected to be issued.

In the State courts there have been a considerable number of cases examining their right under State statutes, as tested by their respective State Constitutions, to render declaratory judgments. A leading State case as to this is that of *Anway v. Grand Rapids R. Co.*,<sup>27</sup> decided in 1920. In that case the majority refer to and quote from *Muskrat v. United States*<sup>28</sup> and say: "This case should forever put at rest this question [that a declaratory judgment may not be rendered]. It is absolutely decisive of the question before us."<sup>29</sup>

### § 1068. Advisory Opinions and Declaratory Judgments Distinguished.

Earlier in this treatise, the refusal of the Supreme Court to render "Advisory Opinions" has been discussed.<sup>30</sup> An advisory opinion, as distinguished from a declaratory judgment, is one that is rendered by a court at the request of an executive or legislative organ of the government, and not in a "case" presented to the court.<sup>31</sup>

<sup>26</sup> 274 U. S. 123.

<sup>27</sup> 211 Mich. 633; 179 N. W. Rep. 350.

<sup>28</sup> 219 U. S. 346.

<sup>29</sup> There was a strong dissent in this case and the majority position has not met with full approval by the bar. For general discussions of the desirability, as well as the constitutionality, of declaratory judgments, see the following articles in the law journals: 28 *W. Virginia Law Quarterly*, 1; 35 *Yale Law Journal*, 473; 9 *Virginia Law Review*, 169; 56 *American Law Review*, 659; 15 *American Political Science Review*, 261; 16 *Illinois Law Review*, 436; 10 *California Law Review*, 158.

<sup>30</sup> See § 18.

<sup>31</sup> "Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented. The decision of a moot case is mere dictum, as no rights are affected thereby, while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested parties." Dissenting opinion of Judge Sharp in *Anway v. Grand Rapids R. Co.* (211 Mich. 592); 179 N. W. Rep. 350.

For an excellent discussion of advisory opinions, see A. R. Ellingwood, *Departmental Cooperation in State Government*, published in 1918.

### § 1069. Powers of Courts to Punish Contempts.

Within recent years the question of the constitutional extent of the legislative control over the powers of the courts has been discussed with especial reference to the regulation of the courts' power to punish for contempt, and to issue writs of injunction.<sup>32</sup>

That, generally speaking, the power to punish for contempt is inherent in courts is beyond question. It may, however, be argued that where the existence and jurisdiction of a court are wholly within the control of the legislative body, as is the case with the inferior Federal courts, authority exists in the legislature to determine the circumstances under which contempt may be held to have been committed, the form of trial therefor, and the punishment which, upon conviction, may be inflicted. The power has, indeed, in a measure, been exercised by Congress, which, by law of March 2, 1831,<sup>33</sup> limited the contempt powers of the Federal courts to three classes of cases: (1) Those where there has been misbehavior in the presence of the court, or so near thereto as to interfere with the orderly performance of its duties; (2) where there has been misbehavior on the part of an officer of the court with reference to official transactions; and (3) where there has been disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court.<sup>34</sup>

The general character of this statutory provision of 1831, and its relation to the present Section 268 of the Judicial Code was considered in *Toledo Newspaper Co. v. United States*.<sup>35</sup>

In *Gompers v. Buck's Stove and Range Co.*<sup>36</sup> with reference generally to the power to punish for contempt, the court said: "While it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory. . . . There has been a general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal, or to a jury in the same tribunal. . . . Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private individuals."<sup>37</sup>

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<sup>32</sup> Cf. *Harvard Law Review*, XIII, 615, article, "Constitutional Regulation of Contempt of Court," by Wilbur Larremore.

<sup>33</sup> 4 Stat. at L. 487. See also, *ante*, § 561, as to the provisions of the Clayton Act of October 15, 1914. 38 Stat. at L. 730.

<sup>34</sup> Cf. *Ex parte Robinson* (6 McLean, 355). As to cases coming constructively within the first of the three classes noted in the text, see dissenting opinion of Justice Holmes in *Craig v. Hecht* (263 U. S. 255).

<sup>35</sup> 247 U. S. 402.

<sup>36</sup> 221 U. S. 418.

<sup>37</sup> Citing *Bessette v. W. B. Conkey Co.* (194 U. S. 324).

The foregoing has reference to contempt proceedings based upon refusal of parties to obey orders of the court, and it is quite clear from the language of the court that, in such contempt proceedings, the court will not recognize the validity of legislative attempts to limit its powers in the premises or the mode and manner in which it is to be exercised. The situation is perhaps different as regards contempt proceedings based upon acts in disturbance of the dignity, decorum or the efficient conduct of the proceedings of the court.

It may also be noted that the *Gompers* case is authority for the proposition that a person held in contempt because of a refusal upon his part to obey a mandate of the court cannot justify his refusal by alleging the invalidity of the disobeyed order, unless that invalidity is due to the lack of jurisdiction upon the part of the court to issue the writ. The court, as to this, said: "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." In *Howat v. State of Kansas* <sup>38</sup> the court was still more explicit, and said: "An injunction duly issuing out of a court of general jurisdiction with equity powers, on pleadings properly invoking its action, and served on persons made parties therein and within the jurisdiction, must be obeyed by them until reversed, however erroneous the action of the court may be, and even though the error be in the assumption of the validity of a seeming, but void, law, going to the merits of the case." And, later: "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

In *Michaelson v. United States* <sup>39</sup> in which the court was called upon to construe the provisions of the Clayton Act with reference to contempts, the court, as has been earlier pointed out, <sup>40</sup> upheld these provisions as applying only to criminal contempts. As to such contempts the court declared that its discretion was incidental and subordinate to the dominating penal purpose of the proceedings, and, therefore, that the proceeding might be regulated by statute without impairing the inherent and necessary scope of the judicial power possessed by the court. The attributes which inhere in and are inseparable to the judicial power, the court declared, could not be abrogated or rendered practically inoperative by Congress. "If," said the court, "the reach of the statute had extended to the cases which are excluded a different and more serious question would arise."

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<sup>38</sup> 258 U. S. 181.

<sup>39</sup> 266 U. S. 42.

<sup>40</sup> See *ante*, § 563.

### § 1070. Congressional Power to Restrict the Scope of Charges to the Jury by Federal Judges.

There has been some agitation to obtain from Congress a statute providing that it shall be deemed reversible error for Federal trial judges in jury cases to express their opinion as to the credibility of witnesses or as to the weight of evidence.

The constitutionality of such a measure may well be doubted, and its advisability questioned. Such a statutory declaration as to the exercise by the courts of their powers would seem to approach very near to, if not actually to invade, the sphere of judicial authority which is invested by the Constitution exclusively in the Federal courts.<sup>41</sup> This point has never been expressly passed upon by the courts, since the measure has not obtained enactment. However, in *Nudd v. Burrows*,<sup>42</sup> in which the court was called upon to consider the act of Congress of June 1, 1872, known as the "Conformity Act" <sup>43</sup> we find the court saying: "There are certain powers inherent in the judicial office. How far the Legislative Department of the Government can impair them, or dictate the manner of their exercise, are interesting questions, but it is unnecessary in this case to consider them." Also, in *Capitol Traction Co. v. Hof*,<sup>44</sup> it is pertinent to note that the court described the right to jury trial which is constitutionally guaranteed as one of the twelve men "under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."

### § 1071. Power of Federal Courts to Suspend Sentences.

Judicial circles were considerably surprised in 1916 by the decision of the Supreme Court, in *Ex parte United States*,<sup>45</sup> that a Federal District Court, having no statutory authorization so to do, had no power to order the indefinite suspension of the execution of a sentence of imprisonment imposed by it. The argument of the Supreme Court that such a right is not included within the judicial power was founded upon the proposition that the power to enforce a law does not include the power permanently to refuse to do so. The court said: "Indisputable also is it that the authority to define and fix the punishment for crime is legislative, and includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department."

In the remainder of the opinion the Supreme Court denied that the right

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<sup>41</sup> As to this see the able brief of Mr. T. W. Shelton before the Senate Judiciary Committee at its hearing of November 10, and 22, 1915.

<sup>42</sup> 91 U. S. 426.

<sup>43</sup> 17 Stat. at L. 197.

<sup>44</sup> 174 U. S. 1.

<sup>45</sup> 242 U. S. 27.

in question was sanctioned as a judicial one by the common law, or by the adjudications of State and Federal courts, although it was recognized that, as to the State courts, there was a conflict of decisions.<sup>46</sup> The Supreme Court further recognized that the power in question had, in fact, been many times exercised by both Federal and State courts, but this practice, the court declared, had been by no means a universal one, and, in any event, it could not operate to override the court's judgment as to the essential unconstitutionality of the practice.<sup>47</sup>

### § 1072. Parole Law of 1925.

By act of March 3, 1925,<sup>48</sup> Congress has expressly given to the Federal courts, except in the District of Columbia, the power to suspend sentences and to place convicted persons upon parole. The act enters into some details as to the manner in which the parole system thus provided for shall be administered, but its essential provision with reference to granting authority to the courts is the first paragraph of Section 1 which reads: "That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years." <sup>49</sup>

### § 1073. Pardoning Powers of the President and Contempts.

Arguing from the general principle of the independence of the three departments of government it would seem that the question as to the power of the President to pardon persons adjudged by one of the Federal courts to

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<sup>46</sup> The decision of the District of Columbia court in *Milton v. United States* (41 App. D. C. 52) (1913) sustaining the court's right to suspend sentence was declared by the Supreme Court to have been demonstrated to be unsound by the Supreme Court's reasoning in the instant case.

<sup>47</sup> For a general discussion of the power of courts to suspend sentences, see the article by Professor A. A. Bruce, "The Power to Suspend a Criminal Sentence for an Indefinite Period or During Good Behavior," in 6 *Minn. Law Review*, 363.

<sup>48</sup> 43 Stat. at L. 1259.

<sup>49</sup> As to the possible unconstitutionality of this law as an invasion of the President's power to pardon, see the article "The Constitutionality of the Federal Parole Law" by A. K. McNamara in 45 *American Law Review*, 401.

be in contempt should be answered in the negative, for clearly to give this power to the executive is to place in his hands a weapon with which he may completely nullify the court's power to enforce its decrees. To this it may be replied, however, that, having the direction of the armed forces of the nation he has the power in any event, and the Constitution vesting in him the general power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," it would seem to follow that the power to remit the punishment of those convicted by the Federal courts of contempt is given.

With reference to this, however, there is a distinction to be made between criminal contempts and so-called civil contempts. In civil contempts the defendant is fined or imprisoned in order to obtain for a suitor his private rights. Punishment for criminal contempts, upon the other hand, is imposed to uphold and vindicate the dignity of the court. Though the Supreme Court has never passed directly upon this point, there would seem to be no doubt but that the pardoning power of the President extends at least to persons punished for criminal contempts. In 1902 in *Re Nevitt*<sup>50</sup> the Circuit Court of Appeals for the eighth circuit held that the President might pardon criminal contempts, and intimated that the same was true as to civil contempts. This last would seem to be a doubtful doctrine. Attorneys General Gilpin and Mason have both held that the President may pardon criminal contempts,<sup>51</sup> and, this was expressly held by the Supreme Court in *Ex parte Grossman* in an elaborate opinion.<sup>52</sup>

Where the point has been raised in the State courts, they have with unanimity held that the governor has the power in question.<sup>53</sup>

#### § 1074. The Performance of Administrative Acts by the Courts.

Courts have no hesitation in performing ministerial acts if such acts are incidental to the exercise of their proper judicial functions. But they will not perform administrative acts not so connected.

In *Hayburn's case*<sup>54</sup> the Federal circuit judges before whom the question was raised unanimously refused, as directed by an act of Congress, to inquire into and to take evidence as to the claims of invalid pensioners and to submit their findings for final action to the Secretary of War, on the ground that inasmuch as their acts were made reviewable by an executive officer they could not be deemed judicial in character.

In *United States v. Ferreira*<sup>55</sup> the Supreme Court held that an act of Congress which gave to the District Judge of Florida the authority to pass

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<sup>50</sup> 117 Fed. Rep. 448.

<sup>51</sup> *Dixon's case* (3 Op. Atty. Gen. 662; 4 Op. Atty. Gen. 458). See *Columbia Law Review*, III, 45.

<sup>52</sup> 267 U. S. 87.

<sup>53</sup> See *Sharp v. State* (49 S. W. Rep. 752), where the authorities are cited.

<sup>54</sup> 2 Dall. 409.

<sup>55</sup> 13 How. 40.



upon certain claims, which decisions were to be reported to the Secretary of the Treasury for his discretionary action thereupon, gave to such judge not judicial but administrative powers, and, therefore, that, when so acting, he sat as a commissioner and not as a court, and, consequently, that an appeal would not lie from his decisions to the Supreme Court. The opinion declared: "The powers conferred by these acts of Congress upon the judge, as well as the Secretary, are, it is true, judicial in their nature; for judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commission appointed to adjust claims to lands or money, under a treaty; or special powers to inquire into or decide any particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as a commissioner, but is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

In the case of *Gordon v. United States*<sup>56</sup> the Supreme Court refused to review the action of the Court of Claims in respect to a claim examined and allowed by it under an act of Congress which provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims until after an appropriation therefor had been estimated by the Secretary of the Treasury and an appropriation to pay it made by Congress. The appeal of Gordon was dismissed on the ground that Congress could not "authorize or require this [the Supreme] court to express an opinion in a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said the Chief Justice, "is a part and an essential part of every judgment passed by a court having judicial power. It is no judgment in the legal sense often without it. Without such an award the judgment would be inoperative and nugatory leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this Act of Congress."<sup>57</sup>

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<sup>56</sup> 2 Wall. 561. See also, 117 U. S. Appendix 697.

<sup>57</sup> In the case of *Re Sanborn* (148 U. S. 222) the same doctrine was applied to substantially similar facts. It may be remarked that, though the fourteenth section of the original act of 1863 has been repealed, and the Supreme Court now entertains appeals from the Court of Claims, the judgments are not even now, strictly speaking, self-executing, an appropriation by Congress for their payment being required, which appropriations are made at the suggestion of the heads of departments out of whose proceedings the claims have arisen.

The courts will not exercise powers which they deem essentially legislative in character. For example, while they assert their right, in proper cases, to declare illegal specific rates fixed by administrative or legislative bodies, they will not themselves declare what the proper rates shall be, for it is established that rate-making is an essentially legislative function. Thus, in *Keller v. Potomac Electric Power Co.*<sup>58</sup> which was a case on appeal from a decision of the Court of Appeals of the District of Columbia which was concerned with a comprehensive Public Utilities Law of Congress for the District, the Supreme Court recognized that, having exclusive jurisdiction over the District of Columbia, Congress had the same constitutional authority that the States have (so far as the Federal Constitution is concerned) to disregard the principle of the Separation of Powers and therefore vest the performance of legislative or administrative functions in the courts, but that Congress could not vest in the Federal Supreme Court by appeal or otherwise, such authority. The section (64) of the Public Utilities Law in question which gave this authority was therefore held invalid so far as it related to appeals to the Supreme Court.

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<sup>58</sup> 261 U. S. 428.

## CHAPTER LXXXIX

### THE DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE OFFICIALS OR AGENCIES

#### § 1075. Delegated Power May Not Be Delegated.

“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by that constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.”<sup>1</sup>

The principle as thus absolutely stated is subject to one important exception, and to several qualifications, or at least explanations.

#### § 1076. Local Governing Powers May Be Delegated.

The exception is with reference to the delegation of powers to local governments. The courts have held, as to this, that the giving by the central legislative body of extensive law-making powers with reference to local matters to subordinate governing bodies being an Anglo-Saxon practice, antedating the adoption of the Constitution, and the right of local self-government being so fundamental to our system of politics, our Constitutions are, in the absence of any express prohibitions to the contrary, to be construed as permitting it.<sup>2</sup>

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<sup>1</sup> Cooley, *Constitutional Limitations*, 7th ed., 163.

<sup>2</sup> “It seems to be generally conceded,” the court said in *State v. Noyes* (30 N. H. 279), “that powers of local legislation may be granted to cities, towns, and other municipal corporations and it would require strong reasons to satisfy us that it could have been the design of the framers of our Constitution to take from the legislature the power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all the other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of the most valuable institutions.” Cf. Cooley, *Const. Lim.*, 7th ed., 265, note, and authorities there cited.

**§ 1077. Power to Issue Administrative Ordinances May Be Delegated.**

The qualifications to the rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities: (1) to determine in specific cases when and how the powers legislatively conferred are to be exercised; and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met, and the rights therein created to be enjoyed.

The principle which permits the legislature to provide that the administrative agent may determine when the circumstances are such as require the application of a law is defended upon the ground that at the time this authority is granted, the rule of public policy, which is the essence of the legislative act, is determined by the legislature. In other words, the legislature, as it is its duty to do, determines that, under given circumstances, certain executive or administrative action is to be taken, and that, under other circumstances, different or no action at all is to be taken. What is thus left to the administrative official is not the legislative determination of what public policy demands, but simply the ascertainment of what the facts of the case require to be done according to the terms of the law by which he is governed. Thus in *Locke's Appeal*<sup>3</sup> the court said: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. The court cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."<sup>4</sup>

**§ 1078. *Field v. Clark*.**

The doctrine thus declared is without objection so long as the facts which are to determine the executive acts are such as may be precisely stated by the legislature and certainly ascertained by the executive. When this is not so, the officer intrusted with the execution of the law is necessarily vested with an independent judgment as to when and how the law shall be executed; and when this independence of judgment is considerable there is

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<sup>3</sup> 72 Pa. St. 491.

<sup>4</sup> Quoted and approved in *Field v. Clark* (143 U. S. 649).

ground for holding that the law is not simply one *in præsenti* to take effect *in futuro*, but is a delegation of the law-making body of its legislative discretion. This was one of the points especially urged in the leading case of *Field v. Clark*.<sup>5</sup> By the third section of the Tariff Act of October 1, 1890, it was provided that, with a view to securing reciprocal trade, "whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just."

The provisions which have been quoted, it was argued, exhibited an endeavor on the part of Congress to vest in the President an unconstitutional discretionary power as to when certain taxes should and when they should not be levied and collected. The Supreme Court, however, upheld the grant of power, saying, with reference to the provision in question: "It does not in any real sense, invest the President with the power of legislation. . . . Congress itself prescribed in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and from a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. . . . 'The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursu-

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<sup>5</sup> 143 U. S. 649.

ance of the law. The first cannot be done; to the latter no valid objection can be made. *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.*, 1 Ohio St. 88.”<sup>6</sup>

### § 1079. Other Illustrative Cases.

The question when an administrative discretion is so broad as to amount to a legislative power is one that may not be answered according to any fixed formula, but one that has to be answered in each individual case according to the judgment of the court. During recent years, with the increase of governmental functions, both in number and complexity, and especially with the extension of the law's control over matters of industrial

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<sup>6</sup> From the decision of the majority, Chief Justice Fuller and Justice Lamar dissented. After citing the provisions of the early embargo acts which had been held constitutional by the Supreme Court in *The Brig Aurora* (7 Cr. 383) the dissenting justices said:

“These [earlier] enactments, in our opinion, transferred no legislative power to the President. The legislation was purely contingent. It provided for an ascertainment by the President of an event in the future, an event defined in the act and directed to be evidenced by his proclamation. It also prescribed the consequences which were to follow upon that proclamation. Such proclamation was wholly in the nature of an executive act, a prescribed mode of ascertainment, which involved no exercise by the President of what belonged to the law-making power. The supreme will of Congress would have been enforced whether the event provided for had or had not happened, either in continuance of the restrictions, on the one hand, or on the other, in their suspension.

“But the purpose and effect of the section now under consideration are radically different. It does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes farther than that, and deposes to the President the power to suspend another section in the same act whenever ‘he may deem’ the action of any foreign nation producing and exporting the articles named in that section to be ‘reciprocally unequal and unreasonable’; and it further deposes to him the power to continue that suspension and to impose revenue duties on the articles named ‘for such a time as he may deem just.’ This certainly extends to the Executive the exercise of those discretionary powers which the Constitution has vested in the law-making department. It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable, in its operation upon the products of this country.

“These features of this section are, in our opinion, in palpable violation of the Constitution of the United States and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government. None of these legislative precedents, save the one above referred to, have, as yet, undergone review by this court or been sustained by its decision. And if there be any congressional legislation which may be construed as delegating to the President the power to suspend any law exempting any importations from duty, or to reimpose revenue duties on them, upon his own judgment as to what constitutes in the revenue policy of other countries a fair and reasonable reciprocity, such legislative precedents cannot avail as authority against a clear and undoubted principle of the Constitution.”

and technical interest, the delegation to administrative agents and in particular to boards or commissions, of wide spheres of discretionary action, has become a necessity. This in turn has given rise to a very great number of cases in both the Federal and State courts in which it has been alleged that legislative power has been unconstitutionally delegated. In this treatise it will be clearly impossible to consider more than a few of the more recent and more important cases in which the question has been considered by the Supreme Court of the United States. These will, however, be sufficient to illustrate and exhibit the general principle.

In *Buttfield v. Stranahan*<sup>7</sup> decided in 1904, the court held valid the grant by Congress to the Secretary of the Treasury of authority to establish standards, upon recommendation of a board of experts, by which should be determined the purity, quality and fitness for consumption of teas sought to be exported into the United States, and to exclude from importation such teas as should not satisfy these requirements as provided by law. "We are of opinion," said the court, "that the statute, when properly construed . . . but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute." "Whether or not," the court added, "the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important, there is no assertion here of bad faith or malice on the part of that officer in fixing the standards or on the part of the defendant in the performance of the duties resting on him."

In *Union Bridge Co. v. United States*,<sup>8</sup> decided in 1907, the general doctrine relating to the delegation of legislative power was again extensively considered, the court in that case sustaining the constitutionality of a statutory grant to the Secretary of War of authority to require changes or alterations in bridges over navigable water ways of the United States when, after a hearing of the parties interested, he is satisfied that the structure as erected or contemplated constitutes or will constitute an unreasonable obstruction to navigation. After a review of the cases, the court declared the statute in entire harmony with the principles announced in them. To deny to Congress the authority thus to delegate to the executive branch of the government the exercise in specific instances of a dis-

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<sup>7</sup> 192 U. S. 470.

<sup>8</sup> 204 U. S. 364.

cretionary power which, from the nature of the case, Congress could not itself exercise, would be, the court said: "to stop the wheels of government, and bring about confusion, if not paralysis, in the conduct of the public business."<sup>9</sup>

In *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*<sup>10</sup> it was held that legislative power had not been granted to the American Railway Association and the Interstate Commerce Commission by the Safety Appliance Act of 1893, which forbids the use of only such cars as have draw-bars of uniform height, and empowers the Association to fix and the Commission to declare, the standard.

### § 1080. Delegation of Rate-Making Powers.

That the fixing of the rates or charges that may be collected by public service corporations for the services rendered by them is, primarily at least, a legislative function, is so well established that the citation of authorities is scarcely necessary.<sup>11</sup> Indeed, it was originally held in *Munn v. Illinois*<sup>12</sup> that this power was so exclusively legislative that the validity of the laws in regulation of business affected with a public interest could not be questioned by the courts under the due process of law clauses of the Constitution.<sup>13</sup>

In the States the delegation by the legislative body, to commissions or other boards, of authority to fix rates has been generally sustained where by law general principles have been established for the guidance and control of these administrative bodies in the exercise, in specific instances, of their rate-making powers.

In a number of instances these laws have come before the Supreme Court of the United States, but not in such a way as to compel that court to pronounce squarely upon their constitutionality as tested by the principle that legislative power may not be delegated by the law-making body to an administrative board or commission. And, indeed, this is a question of State constitutional law with which the Federal courts have no concern. It is only when the allegation is made that the rates as fixed, whether directly by the legislature or by another authority, are unreasonable, and, therefore, operate to deprive either the railway or the shipper of property without due process of law, that a Federal question is raised.

That a considerable amount of regulative control over railways may

<sup>9</sup> The requirement that alterations shall be made is not, the court went on to hold, a taking of private property for public use, for which compensation must be made, but is a proper measure incidental to the regulation of commerce among the States.

<sup>10</sup> 210 U. S. 281.

<sup>11</sup> In *Atlantic C. L. R. Co. v. North Carolina Corp. Com.* (206 U. S. 1) a long list of cases as to this are cited in a footnote.

<sup>12</sup> 94 U. S. 113.

<sup>13</sup> See § 1117.



constitutionally be delegated to the Interstate Commerce Commission has not been disputed. It was not until the act of 1906, however, that that body was intrusted by Congress with the authority to fix in specific instances the rates that interstate railways might charge. By that law it is provided that the rates which these companies may legally fix, or which may be fixed for them by the Commission, must be "just and reasonable." This is, practically, the only principle legislatively laid down for the guidance and control of the Commission. That the extensive discretionary power thus vested in the Interstate Commerce Commission is not legislative in character has been declared by the courts.<sup>14</sup>

### § 1081. Flexible Tariff. Is Legislative Power Delegated to the President?

The purpose of a Flexible Tariff, so called, is to enable customs duties fixed by Congress to be raised or altered by executive action as to specific articles as circumstances may seem to make desirable. Provision to this effect is made by Congress in Section 315 of the Tariff Act of September 21, 1922, which reads, in part: "Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same."<sup>15</sup>

The constitutionality of this delegation of authority to the President was upheld by the United States Customs Court (then known as the Board of General Appraisers) in the case of *Hampton v. United States*,<sup>16</sup> and the decision therein rendered affirmed by the Court of Customs Appeals.<sup>17</sup> The case was held to be governed by the doctrine of the Supreme Court in *Field v. Clark*<sup>18</sup> in which, as has been previously noted, Section 3 of the act of 1890, with regard to fixing of reciprocal tariff rates had been upheld. In denial of the contention that, by Section 315 of the act of 1922, power

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<sup>14</sup> See § 507.

<sup>15</sup> The other provisions of this section relate to the modes in which the differences in costs of production are to be ascertained, the considerations to be taken into account, etc.

<sup>16</sup> Treasury Decisions, No. 41478, April 6, 1926.

<sup>17</sup> No. 2761, in March, 1927.

<sup>18</sup> 143 U. S. 649.

had been unconstitutionally delegated to the president to legislate and to tax, the Customs Court said:

"To assist the President in ascertaining such differences in cost of production the Tariff Commission is required to make investigation, and in making such investigation to give reasonable public notice of its hearings and reasonable opportunity to the parties interested to be present to produce evidence and to be heard, and for the conduct of such hearings the commission is authorized to adopt such reasonable rules and regulations as it may deem necessary.

"In the instant case such an investigation was made and the President in his proclamation, *supra*, found that the duty fixed in Title 3 in the act of the Congress approved September 21, 1922, did not equal the differences between the cost of production in the United States and the cost of production in Germany of barium dioxide, and therefore determined and proclaimed an increase in duty on such merchandise of 50 per cent. over the rate named in Title 3 as aforesaid, to equal the difference between such cost of production in Germany and the United States. . . . It is our view that the power thus vested in the President was definite and specific and left nothing to his discretion provided the purpose of the law clothing him with such power was faithfully carried out, and it is of course to be presumed the purpose of the law was faithfully executed. . . . In thus finding and proclaiming a duty of 6 cents per pound on barium dioxide the President did not legislate nor impose a tax. In what he did he simply carried out the expressed will of Congress."

In this case it was strongly contended, and this contention was emphasized in the dissenting opinion of Judge Brown, that it was impossible to obtain a definite and accurate finding of the differences in costs of production in the United States and foreign countries of specific articles, and, therefore, that, from the nature of the case, the President was obliged, under the act, to exercise a discretion that was essentially legislative in character. As to whether this definite knowledge had, in the instant case, been obtained, the court said: "This may or may not be true, but at least we are bound to assume that with the resources at the President's command, and presumably used by him in the investigation, his finding of fact was as nearly accurate as it was humanly possible to make it. Nothing more is to be hoped for in any case."

The Court of Customs Appeals in its opinion affirming the holding of the Customs Court conceded that, by the act of 1922, a very broad latitude had been given both to the Tariff Commission and to the President in making findings of fact, and as to the means to be employed in ascertaining such facts, but observed that, since the beginning of tariff legislation, elements and calculations as to values and classifications of imports, had necessarily been left to the judgment of executive or administrative officials, and yet their conclusions had uniformly been held as conclusive except when errors

of law had intervened, and that this practice tended, persuasively, to support the constitutionality of the flexible provisions of the act of 1922, and said: "We are . . . of opinion that Section 315 is not so uncertain of administration as to amount to a delegation of legislative power to the Chief Executive, but is, in that respect, a valid exercise of the constitutional power of Congress."<sup>19</sup>

Upon certiorari, the Supreme Court affirmed the judgment of the Court of Customs Appeals,<sup>20</sup> saying: "Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorized a member of the executive branch to carry out its policy." And, later: "What the President was required to do was merely in execution of the act of Congress. It was not the making of law."

### § 1082. Trading with the Enemy Act: President's Power under.

In *United States v. Chemical Foundation*<sup>21</sup> it was held that there had not been attempted by the Trading with the Enemy Act of October 6, 1917,<sup>22</sup> an unconstitutional delegation of legislative power by reason of the authority vested in the President with regard to sales of properties seized. The act provided that all dispositions by sale or otherwise should be in accordance with the determination of the President, with the proviso that any property sold under the act, except when sold to the United States, should be sold only to American citizens at public sale to the highest bidder, unless the President, stating his reasons therefor, in the public interest should otherwise determine. As to this discretionary power thus placed in the hands of the President, the Supreme Court said: "It was not necessary for Congress to ascertain the facts of or to deal with each case. The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander in Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act."

### § 1083. McNary-Haugen Bill.

The so-called McNary-Haugen Bill for the relief of farmers which passed both Houses of Congress in May, 1928, was vetoed by President Coolidge. In his veto message the President held, supported by the opinion of the

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<sup>19</sup> For arguments *pro* and *contra* as to the constitutionality of the "flexible" provisions of the act of 1922 at the time the act was under discussion, see *Congressional Record*, 67th Cong., 2d sess., vol. 62, pt. II, pp. 11156ff.

<sup>20</sup> *Hampton v. United States* (276 U. S. 394).

<sup>21</sup> 272 U. S. 1.

<sup>22</sup> 40 Stat. at L. 411. Amended March 23, 1918, 40 Stat. at L. 460.

Attorney General, that the measure authorized an unconstitutional delegation of legislative power to the Board and Advisory Council which were provided for by the measure.<sup>23</sup>

#### § 1084. Administrative Ordinances.

The authority that administrative agents may constitutionally exercise in the promulgation of rules and ordinances regulating in detail the execution of the laws the enforcement of which has been placed in their hands, and the legal force to be given to these rules thus administratively established, have given rise to many adjudications. These rules, it is to be observed, fall into two general classes. First, those established by an administrative superior and directed solely to the administrative inferior; secondly, those binding of course the administrative inferiors, but primarily directed to the private citizen, and fixing the manner in which the requirements of the statute are to be met by him. This second class of rules is, in turn, divisible into two classes; those to which a criminal penalty is attached for their violation, and those merely defining the manner in which rights created by the statute are to be enjoyed.

The first of these two main classes of administrative ordinances differs from those of the second class in that though valid as between the administrative superior and his inferior, they do not create legal rights which the private citizen may enforce in the courts. Of this class, for example, are certain of the civil service regulations which the Presidents of the United States have issued under authority of the Civil Service Acts, fixing the classes to be included in the "classified service," providing for examinations for admission to the service, and declaring the conditions under which promotions and removals may be made.

As to those rules or ordinances, established by executive agents, providing the modes under which private persons may receive the privileges granted by law or be held responsible for violations of the duties imposed therein, it may in general be said that the executive may establish all special regulations that fall within the general field of the authority granted by law, and which are reasonably calculated to secure the execution of the legislative will as laid down in the statutes.

With reference to many of the Army and Navy Regulations issued by

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<sup>23</sup> It was also urged against the measure that the equalization fee provided for it could not be constitutionally sustained under the taxing powers of the Federal Government; that the control by the Government, in the interest of the producer alone of prices of goods moving in interstate commerce would not be a valid regulation of such commerce; and that the provisions regarding the appointment by the Board of the members of the Advisory Council (the appointees to be selected from lists of names supplied by co-operative associations and other representative organizations and the governors and heads of agriculture departments of the States) was without constitutional warrant.

See the opinion of the Attorney General of May 22, 1928.

the President it is to be observed that these derive their force not from congressional authorization, but directly from the constitutional power of President as Commander-in-Chief of the army and navy; and this, too, notwithstanding the constitutional provision that Congress may make rules for the government and regulation of the land and naval forces. In the early case of *United States v. Eliason* <sup>24</sup> the court said: "The power of the executive to establish rules and regulations for the government of the army, is undoubted. . . . Such regulations cannot be questioned or denied because they may be thought unwise or mistaken."

An administrative officer in the execution of his duties may not change the express provisions of the law, even though these provisions no longer seem the best adapted to secure the end desired by Congress. Thus in *Merritt v. Welsh* <sup>25</sup> a customs officer was not permitted to substitute a different test from that fixed by Congress for the determination of the quality of imported sugars. "If experience shows," the opinion declared, "that Congress acted under a mistaken impression, that does not authorize the Treasury Department or the courts to take the part of legislative guardians and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed has not, as yet, seen fit to make."

Thus again, in *Morrill v. Jones* <sup>26</sup> the court said: "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operations to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

### § 1085. Penal Ordinances.

The courts scrutinize with especial care those cases in which a criminal action is based upon the violation of an administrative order. It is not questioned that the legislature may attach a criminal liability to the violation of an administrative order, but in each case it must clearly appear that

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<sup>24</sup> 16 Pet. 291.

<sup>25</sup> 104 U. S. 694.

<sup>26</sup> 106 U. S. 466.

the order is one which falls within the scope of the authority conferred. Thus, while there are many cases in which it has been held that the delegation of an ordinance-making power to the executive is not a delegation of legislative power, there are comparatively few cases in which has been sustained the right of an administrative officer to establish an ordinance the violation of which will be punished criminally. In *United States v. Maid* <sup>27</sup> the court said:

"A department regulation may have the force of law in a civil suit to determine property rights, . . . and yet be ineffectual as the basis of a criminal prosecution. . . . The obvious ground of distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing by the President or head of a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial function."

In *United States v. Eaton* <sup>28</sup> was involved the authority of a regulation of the commissioner of internal revenue, directing wholesale dealers in oleomargarine to keep book accounts and to make certain monthly returns. This regulation had been made in pursuance of an act of Congress regulating the sale of oleomargarine, which, besides making certain specific requirements, provided that the commissioner, with the approval of the Secretary of the Treasury, might "make all needful regulations for the carrying into effect of this act." The court held that this provision did not enable the commissioner to render criminal the failure to conform to additional requirement with reference to books and reports which his regulations had sought to impose. The court said: "It is a principle of criminal law that an act which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' <sup>29</sup> It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under sec. 18 of the Act; particularly when the same Act, in sec. 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

<sup>27</sup> 116 Fed. Rep. 650.

<sup>28</sup> 144 U. S. 677.

<sup>29</sup> 4 Am. and Eng. Enc. Law, 642; 4 Bl. Com. 5.

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in sec. 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In *United States v. Bailey*<sup>30</sup> the following facts were involved: The Secretary of the Treasury, in order to carry into effect the authority given him by act of Congress to liquidate and pay certain claims, had, though not expressly empowered so to do by the act, authorized, by a regulation, affidavits to be made before any justice of the peace of a State. An indictment for false swearing in one of these affidavits having been brought, the question was raised as to the Secretary's power to make the regulation. The court held that he had the authority, saying: "It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given. Thus in this case, though express statutory authority was not given, the Secretary was held competent not only to make the regulation in question, but to make that regulation effective to sustain a prosecution for perjury under an act of Congress (Mch. 1, 1823), which provided that 'if any person shall swear or affirm falsely touching the expenditure of money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury.'"

The position here taken was not in conflict with that assumed by the court in *United States v. Eaton*. In both cases the question was whether, under the circumstances of the case, Congress might properly be construed to have granted, implicitly, the ordinance-making power that was exercised. It is to be conceded, however, that in the *Bailey* case the powers of the commissioner were very liberally construed.<sup>31</sup>

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<sup>30</sup> 9 Pet. 238.

<sup>31</sup> Upon this topic see the article "To What Extent Have Rules and Regulations of the Federal Departments the Force of Law," by Morris M. Cohn, in the *American Law Review*, XII, 343.

In *Ex parte Kollock* <sup>32</sup> there was involved the same statute as in the case of *Eaton*. Here, under the general terms of the act, the commissioner was authorized to prescribe rules regulating the forms and markings of packages of oleomargarine, the violations of which rules should constitute a criminal offence. This was held to be not a delegation of legislative power, and an indictment based upon the rules issued was sustained. The court said: "The Act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue act, the designation by the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer."<sup>33</sup>

In the recent case of *Oceanic Steam Navigation Co. v. Stranahan* <sup>34</sup> the court upheld the validity of a statutory provision authorizing the Secretary of Commerce and Labor to levy and collect a money penalty from the steamship companies for bringing into the United States aliens affected with loathsome or dangerous contagious diseases. This the court did, however, upon the theory, based, it must be admitted, upon a very liberal interpretation, that the fines authorized to be collected were not penal in character, but an administrative means "to secure the efficient performance by the steamship company of the duty to examine [the immigrants] in the foreign country, before embarkation, and in carrying out the policy of Congress."

That the exaction of a penalty by an administrative officer is necessarily governed by the rules controlling the prosecution of criminal offences, was denied. The doctrine declared in *Wong Wing v. United States* <sup>35</sup> was, therefore, held not to apply.

In *Fong Yue Ting v. United States* <sup>36</sup> it had been held that the right to exclude or to expel aliens, absolutely or upon conditions, being an inherent and inalienable right of a sovereign and independent nation, Congress had the power to expel as well as to exclude undesirable immigrants, and that this power might be exercised entirely through executive officers. A substantially similar position was taken by the court in *Lem Moon Sing v. United States*.<sup>37</sup> In the *Wong Wing* case, however, the court held that

<sup>32</sup> 165 U. S. 526.

<sup>33</sup> Citing *United States v. Symonds* (120 U. S. 46); *Ex parte Reed* (100 U. S. 13); *Smith v. Whitney* (116 U. S. 167); *Wayman v. Southard* (10 Wh. 1).

<sup>34</sup> 214 U. S. 320.

<sup>35</sup> 163 U. S. 228.

<sup>36</sup> 149 U. S. 698.

<sup>37</sup> 158 U. S. 538.



Chinese persons might not be imprisoned at hard labor upon order, without trial by jury, of a United States officer acting under the authorization of the provision of the law of 1892 that "any such Chinese person or persons of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." The court, while holding that the detention or temporary confinement of alien immigrants at the instance of administrative agents might be necessary and was allowable as a means for giving effect to the policy of Congress as established by law, declared that imprisonment at hard labor is an infamous punishment which may be constitutionally ordered only after indictment and trial by jury and in a court of justice. "It is not consistent with the theory of our government," the court declared, "that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

By the Railway Rate Act of 1906 the Interstate Commerce Commission is authorized to issue various orders with reference to the conduct of their business by interstate carriers, and provision is made that violations of these orders shall be punishable by fines and forfeitures which may be recovered in civil suits in the name of the United States.

By various acts of Congress the Secretary of Agriculture has been given power to establish rules for regulating the use and occupancy of public forest reservations and for preserving such forests from destruction. Under this authority rules or regulations have been issued by the Secretary. The lower Federal courts have divided as to whether violations of the regulations thus issued may be treated as crimes. The question came before the Supreme Court in *United States v. Grimaud* <sup>38</sup> and was answered in the affirmative. In its opinion the court pointed out that, from the nature of things, it was impracticable for Congress itself to provide regulations for the various and varying details of forest management and that the authority actually conferred related to matters of purely local management and was less than that granted by State legislatures to municipalities by virtue of which they make by-laws, ordinances, etc., for the government of towns and cities, the violations of which are punished as penal offences. As to the holding of the court in *United States v. Eaton*, <sup>39</sup> the court pointed out that in that case it was held that while Congress might have made punishable the violation of the orders which the administrative agency was authorized to issue, it had not, in fact, done so, and, therefore, that the administrative agency could not so provide. In the instant case, however, Congress had provided in the Forest Reserve Act that "any violation of the provisions of this Act or such

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<sup>38</sup> 220 U. S. 506.

<sup>39</sup> 144 U. S. 677.

rules and regulations (of the Secretary of Agriculture) shall be punished" as prescribed in Section 5388 of the Revised Statutes as amended.

### § 1086. The Referendum as a Delegation of Legislative Power.

The subject indicated by the heading to this Section, though not one falling within the subject stated in the title to the present chapter, may, as involving a matter of delegation of legislative power, be here considered,

Whether or not a State ceases to have a government republican in form by adopting the initiative and the referendum for purposes of legislation has been declared by the Supreme Court to be a political question the determination of which lies solely with Congress.<sup>40</sup> Whether or not the adoption of these devices by the States operate as an unconstitutional delegation of legislative power is a question for the courts of the States concerned to determine in accordance with their own judgments and the specific requirements of their own constitutions. Though thus not, as yet at least, a matter of Federal constitutional importance it may be said that the weight of authority would seem to be against the validity of statutory provisions for the submission to the electorate of the State of the question as to whether a measure shall or shall not become a law.<sup>41</sup> In answer to the point that the law-making power was not thus transferred, but simply the operation of the statutes in question made dependent upon the happening of a particular event, namely, the approving vote of the people, the court of New York, in *Barto v. Himrod* <sup>42</sup> said: "It is not denied that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. But such a statute, when it comes from the hand of the legislature, must be a law *in presenti* to take effect *in futuro*. . . . The event or change of circumstances on which a law may be made to take effect must be such as in the judgment of the legislature affects the question of the expediency of the law—an event on which the expediency of the law in the judgment of the lawmakers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. . . . But in the present case no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free school law, abstractly considered, did not depend on a vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterward. The event on which the act was made to take effect was nothing else than the vote of the people on the identical question which the Constitution makes

<sup>40</sup> *Pacific States Telephone and Telegraph Co.* (223 U. S. 118).

<sup>41</sup> *Cf. In re Municipal Suffrage* (160 Mass. 666); *Santo v. Iowa* (2 Ia. 165); *Oberholtzer, The Referendum in America*, and *Cooley, Const. Lim.*

<sup>42</sup> 4 Seld. 483.

it the duty of the legislature itself to decide. . . . The government of the State is democratic, and it is a representative democracy, and in passing general laws, the people act only through their representatives in the legislature." <sup>43</sup>

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<sup>43</sup> While, as indicated, direct legislation laws of a general character have at times been held unconstitutional, special referendum, or local option, laws, have been held valid, the point being taken; among others, that at the time the Federal and State Constitutions were adopted, measures of this character were generally recognized as proper, and construed to provide for delegation of local governing, rather than legislative, powers. Thus Cooley, summing up the argument upon this point, says: "It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation [liquor laws, etc.] usual with such corporations, would pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State, and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of state policy or dangers of local abuse to warrant the interposition." *Constitutional Limitations*, 7th ed., p. 264. In the earlier cases (*Wales v. Belcher*, 3 Pick. 508; *Godden v. Crump*, 8 Leigh, 120; *Burgess v. Pue*, 2 Gill, 11) general referendum laws were sustained, but since the decision of the Delaware court in 1847 (*Rice v. Foster*, 4 Harr. 479) the general practice, as indicated in the text, has been to hold them void as a delegation of legislative power.

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## CHAPTER XC

### THE DELEGATION OF JUDICIAL POWER TO ADMINISTRATIVE OFFICIALS OR AGENCIES

#### § 1087. Quasi-Judicial Functions of Administrative Bodies.

The preceding chapter has dealt with the extensive regulatory powers that may be vested in administrative officials or agencies without violating the constitutional principle that the exercise of powers vested in Congress may not, by that body, be delegated to other agencies.

In the exercise of their discretionary powers administrative agencies not only issue regulations, or ordinances, which have the force of law, but issue commands to individuals in specific cases brought to them or initiated by them *ex proprio motu*. Also, in many cases, the administrative agencies institute inquiries or carry on investigations in order to determine, upon a basis of fact, what regulations or ordinances it will be proper and expedient for them to issue; and, for the making of such inquiries, they have been invested by the legislature, either expressly or by implication, with authority to issue compulsory processes in order to obtain the presence of witnesses, to compel testimony upon their part, and to produce documents and other kinds of evidence.

The hearings or investigations thus carried on are judicial to the extent that they are similar to the activities of the courts of law when securing necessary evidence in the cases litigated before them. Similarity also exists in the fact that the giving of false testimony before administrative bodies may be punished by the courts as perjury. The refusal to give evidence may also be held to constitute contempt, which, however, is not punished as such by the administrative agencies themselves, but by the courts to whom the refusal to testify is referred. However, such investigatory proceedings of administrative agencies are not judicial in the full sense of the word since they are not proceedings for the determination of contested rights between litigants who are to be bound by the decisions which are rendered. Thus, while constitutional questions have arisen as to the extent to which administrative agencies may constitutionally be empowered to inquire into the private interests of individuals, or, possibly, by compelling testimony, to cause a witness to incriminate himself,<sup>1</sup> there has been no attempt to have the investigatory and fact-finding work of administrative agencies (so far as it serves as a basis for the issuance of ordinances or decrees) declared void as an unconstitutional delegation of judicial power.

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<sup>1</sup> These matters are elsewhere discussed.

When, however, administrative proceedings are had which are to lead to the issuance of decrees directed to individuals, and which directly affect their liberty of action or their property rights, the judicial field is approached much more nearly. Indeed, the courts have recognized, as they could not help doing, that, in many cases, these proceedings involve matters which it would be appropriate to submit for determination to themselves. And yet, and perhaps upon grounds of expediency, the courts have held that such proceedings may be had by administrative bodies, provided they, the courts, have the right to see that the requirements of due process of law have been satisfied, that the administrative agencies have not exceeded their statutory jurisdictions, and that, in other respects, their proceedings have been free from legal error.<sup>2</sup>

In *Louisville & Nashville R. Co. v. Garrett*,<sup>3</sup> answering the contention that a railroad commission performed a function essentially judicial in character, when, by hearings at which evidence was produced and arguments heard, it determined what regulations it should issue, the court said: "Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily,—even without the express command of the statute,—would the commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is 'the nature of the final act' that determines the 'nature of the previous inquiry.'"<sup>4</sup>

It thus appears that the delegation by Congress to executive or administrative agencies of functions of a judicial, or at least *quasi*-judicial character,

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<sup>2</sup> It is common for administrative agencies not to apply the ordinary legal rules of evidence, and, in fact, they are sometimes directed by the legislature not to do so.

<sup>3</sup> 231 U. S. 298.

<sup>4</sup> Citing *Prentiss v. Atlantic Coast Line Co.* (211 U. S. 210).

provided the exercise of those functions is incidental to the exercise by such agencies of their executive or administrative powers, is not in violation of the principle of the Separation of Powers so far as that principle is recognized by the Federal Constitution, nor is it in violation of due process of law.<sup>5</sup>

In *Murray v. Hoboken Land and Improvement Co.*,<sup>6</sup> the court, after observing that Congress could not withdraw from judicial cognizance any matter which, from its very nature, is a subject of suit at common law, in equity, or in admiralty, nevertheless went on to say: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

It will be observed that the doctrine here declared is with reference only to matters involving "public rights." Thus a statute would undoubtedly be held unconstitutional which attempted to place in administrative hands the final determination of controversies between private individuals. However, as will later appear, especially in relation to employers' liability and workmen's compensation laws, the common-law rights and liabilities may be legislatively altered or even abolished provided there is substituted for them adequate administrative remedies or defences.<sup>7</sup> The effect of such substitution is, of course, to prevent judicial action with regard to whole classes of cases which, before such legislation, were justiciable in the courts, and to empower administrative agencies to give such relief or to impose such liabilities as are recognized and provided for the acts.

### § 1088. Judicial Control of Administrative Action.

The remainder of the present chapter will be devoted to an examination of the extent to which, and the means by which, the courts supervise or control the exercise by administrative agencies of their powers, and especially of their power to determine facts and, upon the basis of them, to issue orders or decrees. In this account no attempt will be made to treat comprehensively the means which the courts, through the employment of such writs as those of certiorari,<sup>8</sup> mandamus, injunction, quo

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<sup>5</sup> See Chapter XCIII.

<sup>6</sup> 18 How. 272.

<sup>7</sup> See Chapter XCVIII.

<sup>8</sup> Although the practice is otherwise in some of the States of the Union, the Federal practice is not to use certiorari in order to obtain judicial review of administrative action, even though that action be of a *quasi*-judicial character. In *Degge v. Hitchcock* (229 U. S. 162), the Supreme Court affirmed the action of the Supreme Court of the District of Columbia in refusing to review on certiorari the legality of an order of the Postmaster-

warranto, habeas corpus, prohibition, etc., control the actions of executive or administrative officials, or, by ordinary actions in tort or otherwise, to visit upon such officials responsibility for illegal acts, done by them under color of official authority. To some extent these judicial processes have been incidentally discussed in connection with other subjects. A direct and comprehensive discussion of them would require a treatise in itself and would involve matters of ordinary as distinguished from constitutional law. Here, therefore, discussion will be confined to matters of special constitutional importance.

### § 1089. *Mandamus.*

That the courts will issue mandamus to compel the performance of ministerial executive or administrative acts is, of course, a rule of law which is not peculiar to Federal constitutional jurisprudence. Its employment for this purpose needs, therefore, to be here considered only as regards the propriety of directing it to such high officials as the President or the heads of departments who stand in such close official relationship to him, and act to such an extent under his immediate direction, as to be his agents.

It may be noted, as a preface to this discussion, that mandamus is used by the courts as an aid to, as well as a restraint upon, the administrative

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General, directing that mail addressed to certain persons be not delivered but be returned to the senders. The Supreme Court of the United States in its opinion called attention to the fact that the case was the first instance in which a Federal court had been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States. After reviewing the nature and history of the use of the writ, the court pointed out that, after the scope of the writ had been widened so as to make it serve the office of a writ of error, it had been granted only in instances in which the inferior tribunal had acted without jurisdiction or in disregard of statutory provisions, and, even in those cases, had run to officers, or other agencies whose findings had the quality of final judgments, and which, even when erroneous, could not be corrected by appeal or other method of review—"In all those cases it ran from court to court—including boards, officers, or tribunals having a limited statutory jurisdiction, but whose judgments would be conclusive unless set aside."

In this case the court held that though the action of the Postmaster-General had been quasi-judicial in character, it had not been a judgment in the sense of a final adjudication. "The Plaintiffs in error were not concluded by his decision, for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. . . . To hold that the writ could issue either before or after an administrative ruling would make the despatch of business in the Departments wait on the decisions of the courts, and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the executive by the judicial branch of the government. The writ of certiorari is one of the extraordinary remedies, and, being such, it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. This cannot be done."

branches of the Federal Government; that is, it is sometimes employed at the instance of administrative superiors to obtain obedience to their commands to their administrative subordinates.<sup>9</sup>

It may further be observed that no general authority to issue the writ of mandamus has been granted by Congress to the Federal courts. However, it has been held that the courts of the District of Columbia possess this power by reason of the general common-law powers which have been vested in them.<sup>10</sup>

### § 1090. Injunction.

The control exercised by the courts over administrative agencies by writs of injunction is, in general respects, controlled by the same considerations as those recognized with reference to writs of mandamus, account of course being taken of the necessity that a basis for equitable relief shall be established.

### § 1091. Heads of Departments May Be Compelled by Mandamus to Perform Non-Political, Ministerial Acts.

The case which is usually cited as establishing once for all the doctrine that the Federal courts may compel by mandamus the performance by executive or administrative officials of purely ministerial acts, is that of *Marbury v. Madison*.<sup>11</sup> That case, however, is not of importance because establishing this principle which was already so well established as to need no reaffirmance, but because it declared the doctrine that the heads of the great departments of the Federal Government were within its application.<sup>12</sup>

In this case, it will be remembered, the court had been asked to issue a mandamus directing the Secretary of State to deliver a certain commission to office which had been approved by the Senate and signed by the President.

In his opinion, Marshall, after repudiating any claim on the part of the court to interfere with the President or other executive agents in the exercise of their political functions, or those discretionary in character, said: "But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others. . . . Where a specific duty is assigned by law, and individual rights depend upon the perform-

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<sup>9</sup> *United States v. Miller* (128 U. S. 40).

<sup>10</sup> *Kendall v. United States* (12 Pet. 524).

<sup>11</sup> 1 Cr. 137.

<sup>12</sup> Even as to this point it has been argued that the opinion was *obiter* inasmuch as the court finally declared that it was without jurisdiction to entertain the suit as an original suit, in which form it had been brought.



ance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy . . . . The question whether a right has vested or not, is, in its nature judicial, and must be tried by the judicial authority." The Chief Justice then went on to consider whether the head of one of the great departments of government is so intimately connected with the President as to place him outside of the reach of the court's order, and said: "If one of the heads of departments commits any illegal act, under color of office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode [mandamus] of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process? It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden, as for example to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases it is not perceived on what grounds the courts of the country are further excused from giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

#### **§ 1092. Amenability of the President to Compulsory Judicial Process.**

The amenability of the President to compulsory judicial process has been considered in Chapter LXXXIII.<sup>13</sup> In that chapter is also considered the amenability to such process of heads of departments when acting for the President.

#### **§ 1093. Judicial Review of Administrative Determinations.**

In general it may be said that complainants are not permitted to question the propriety of administrative action within the general sphere of the statutory authority of the administrative agency, unless the complainants have made use of all means available under the law to question before the ad-

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<sup>13</sup> See § 979.

ministrative agencies the validity or propriety of the action. Thus, in *United States v. Sing Tuck* <sup>14</sup> the court declined to interfere by habeas corpus with the refusal by immigration officials of the right of entry into the United States to a person claiming to be an American citizen, prior to the determination of the propriety of that refusal by the highest administrative officer (the Secretary of Commerce and Labor) to whom the question could, under the law, have been referred.

In many cases it is provided by law that the administrative authorities must resort to the courts for an enforcement of the orders issued by them. In other cases it is provided that an appeal may lie to the courts from administrative determinations. When this is so, there is, of course, no question as to the power of the courts to review administrative determinations. But, where no provision is made for this review, and especially where the law expressly provides that the administrative determinations shall be conclusive in character, the right or propriety of the courts to review, and, if necessary, to revise those determinations is, in many cases, a matter of considerable doubt.

A general survey of the cases shows that the courts exercise a right to review administrative determinations upon the following grounds: (1) in order to ascertain whether the law under which the administrative agency is acting is constitutional; (2) in order to ascertain whether, by its procedure, or by the character of the action taken by it, the administrative body has violated any Federal constitutional provision, and especially that relating to due process of law; (3) granting that the law under which the administrative body is acting is valid, to ascertain whether the administrative body has properly construed the legislative mandate or principle or rule of regulation laid upon it; (4) in order to ascertain whether the administrative agency has acted in an *ultra vires* manner; (5) in order to ascertain whether the administrative agency has exercised its powers in an arbitrary, unreasonable, malicious, or unduly discriminatory or partial manner; and (6) in order to ascertain whether the administrative agency has made a correct finding of facts, or drawn conclusions from the facts found which those facts can, in reason, be conceived to support.

It is clear, as has been earlier said in connection with the powers of the Interstate Commerce Commission,<sup>15</sup> that the courts act with propriety in reviewing administrative action in all of the above cases, and, indeed, that, constitutionally, they cannot be denied the power so to act except with regard to the correctness of the facts found by the administrative agencies, where, by law, such findings are declared to be conclusive in character; and, even when this is so declared by statute, the power of the courts exists to examine as to their correctness when these facts are such as relate to the jurisdiction of the administrative agency to act in the premises.

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<sup>14</sup> 194 U. S. 161.

<sup>15</sup> See § 508.

**§ 1094. Conclusiveness of Administrative Determinations.<sup>16</sup>**

That due process of law, as constitutionally guaranteed, does not require that personal and property rights shall, in all cases, be distinguished from administrative tribunals, is established.<sup>17</sup>

There still remains, however, the right, and, indeed, the obligation, of the courts to prevent administrative tribunals from overstepping their several constitutional or statutory jurisdictions or of applying principles or rules which have not been legislatively sanctioned. But the inquiries thus necessitated require that questions of law and questions of fact be distinguished, and that jurisdictional facts be distinguished from other facts, and be treated by the courts upon a different basis. Inasmuch, however, as juristic logic or analysis has never been able to establish clear criteria of general applicability for making these distinctions, the courts have found themselves free, or, rather, obligated to treat each case upon its own merits and have been able to subsume such cases under only most general canons of judicial propriety. It being, then, impossible to bring all the cases involving the conclusions of administrative determinations into complete logical consistency, it will be necessary to consider them in classes so far as they can be classified.

Professor John Dickinson in a recent and able work<sup>18</sup> has pointed out that, from what may be called considerations of expediency, the courts, with reference to certain classes of cases, have exercised their right to review administrative determinations with considerable strictness, while, in other classes of cases, they have exercised the right with much greater liberality. Thus, he has shown that where the complainant has sought some gratuity or benefit from the government, as, for example, the allotment of public lands, the courts have been disposed to hold themselves concluded by the determinations of administrative agencies even when those determinations have related to facts which have a jurisdictional significance.<sup>19</sup> A similar policy has been pursued with reference to "fraud orders" of the Postmaster-General. Here the postal service has been deemed a necessary function of the government, and the opportunity of individuals to make use of it a privilege rather than a right. So, also, in revenue cases, the interest of the government, being so vital in character, the courts have shown a reluctance to revise administrative determinations. In immigration cases, the situation is not so clear. The liberty of an alien to enter the country can clearly be viewed as a privilege rather than as a right, but the right of a citizen of

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<sup>16</sup> Upon this general subject see the excellent article by Professor T. R. Powell in the *American Political Science Review* for August, 1907, entitled "Conclusiveness of Administrative Determinations in the Federal Government."

<sup>17</sup> *Murray's Lessee v. Hoboken Land and Improvement Co.* (18 How. 272).

<sup>18</sup> *Administrative Justice and the Supremacy of Law in the United States* (Chapter III), Harvard University Press, 1927.

<sup>19</sup> See, for example, *Riverside Oil Co. v. Hitchcock* (190 U. S. 316).

the United States to enter can hardly be so regarded, and yet the determination by immigration officials of the right of individuals to enter often turns upon the question whether they are or are not American citizens. Even here, however, as will be presently shown, the courts have ascribed a conclusiveness to administrative determinations, although the facts involved have been jurisdictional in character. With regard to interstate commerce the determinations of administrative officials have been more readily revised by the courts, especially in cases where large private property interests have been involved. However, even here, the tendency of the Supreme Court has been to accept as conclusive the findings of fact of the Interstate Commerce Commission if there has been any evidence to support such findings.<sup>20</sup>

### § 1095. Customs Appraisals and Classifications.

In a series of cases, the court has given to customs officers final and conclusive authority in the matter of appraisal and classification of imports.

In *Hilton v. Merritt* <sup>21</sup> it was held that Congress having by statute made the appraisers' judgment final and conclusive, an appeal therefrom might not be made to the judiciary, the court saying: "We are of opinion . . . that the valuation made by the customs officers was not open to question in an action at law, as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered by the plaintiffs and ruled out by the court tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute."

In *Buttfield v. Stranahan* <sup>22</sup> the court held conclusive the judgment of the customs officers with reference to the fact whether or not a given importation of tea was of a grade that, under law, entitled it to entrance into the country. The court said: "Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and, if that were important, there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting upon him."

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<sup>20</sup> As to this see the discussion in *Interstate Commerce Commission v. Union Pacific R. Co.* (215 U. S. 452).

<sup>21</sup> 110 U. S. 97.

<sup>22</sup> 192 U. S. 470.

As to the point that due process had been denied the plaintiff in error in that he had had no hearing before the board of tea inspectors and the Secretary of the Treasury when the standards had been fixed, or before the General Appraisers upon the reëxamination of the tea, the court said: "Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they therefore in no just sense concerned the taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of agents of the Government, upon whom power on the subject was conferred."

In *Oceanic Steam Navigation Co. v. Stranahan* <sup>23</sup> it was held, not only that the administrative agency might, without resort to the courts, exact a penalty of a steamship company for bringing into the country an alien with a loathsome or dangerous contagious disease, but that the determination that the alien had such a disease might be conclusively determined by a medical examination made under the direction of the administrative agency. Regarding the imposition of a penalty, the court declared that the rules controlling in the prosecution of criminal offences did not need to apply.<sup>24</sup> After citing cases, the court said: "In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

As to the constitutionality of making the determinations of fact by the administrative agency conclusive, for the purpose of inflicting the penalty, the court said that, since there was no doubt as to the power of Congress to impose the penalty, there was no doubt as to its power to impose upon the administrative officers discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty.

#### § 1096. Valuations.

In *Ohio Valley Water Co. v. Ben Avon Borough* <sup>25</sup> the State court held that, under a State statute, the court had not been given the authority to

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<sup>23</sup> 214 U. S. 320.

<sup>24</sup> On authority of *Hepner v. United States* (213 U. S. 103); *Bartlett v. Kane* (16 How. 263); *Passanant v. United States* (148 U. S. 214); *Origet v. Hedden* (155 U. S. 228).

<sup>25</sup> 253 U. S. 287.

substitute its judgment for that of the administrative agency as to what valuation should be placed upon the properties of public utilities. It also appeared that adequate opportunity had not been otherwise expressly provided, by injunction or other proceedings, for a public utility to test judicially the validity of determinations of the administrative agency which the public utility might deem to be confiscatory in character. In the absence of a ruling by the State court that such a judicial hearing might be had by injunction proceedings, said the Supreme Court, the State law would have to be held invalid as denying due process of law.<sup>26</sup>

### § 1097. Patents.

In *United States v. Butterworth*<sup>27</sup> was sustained the right of appeal to the courts from decisions of the Commissioner of Patents. The court reviewed the patent legislation of Congress and pointed out that property rights were involved, that the determination of claims for patents involved the adjudication of disputed questions of fact upon scientific or legal principles, the process being essentially judicial in character, and that the court, though interposed as an aid to the patent office, was not subject to it, its judgments being binding upon the parties, and conclusive upon the patent office itself. "The commissioner cannot question it. He is bound to record and obey it. His failure to refuse to execute by appropriate action would undoubtedly be corrected and supplied by suitable judicial process."<sup>28</sup>

### § 1098. Treaty Provisions.

In *Comegys v. Vasse*,<sup>29</sup> the court, referring to the Treaty of 1819 between the United States and Spain, said: "The object of the treaty was to invest the commissions with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for

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<sup>26</sup> Justice Brandeis dissented on the ground that it had not been shown that injunction would not lie to test the validity of the determinations of the administrative agency. Justices Holmes and Clarke concurred in this dissent.

<sup>27</sup> 112 U. S. 50.

<sup>28</sup> In *United States v. Duell* (172 U. S. 576), this case was approved and the judicial right of revision stated, if anything, more strongly, the court saying: "We perceive no ground for overruling that case or dissenting from the reasoning of the opinion; and as the proceeding in the court of appeals is an appeal in an interference controversy presents all the features of a civil case,—a plaintiff, a defendant, and a judge.—and deals with a question judicial in its nature, in respect of which the judgment of the court is final, so far as the particular action of the patent office is concerned, such judgment is none the less a judgment 'because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.'" The last clause is quoted from *Interstate Commerce Commission v. Brimson* (154 U. S. 447).

<sup>29</sup> 1 Pet. 193.

damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reëxaminable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim can not be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury.”<sup>30</sup>

### § 1099. Land Patents.

In *Smelting Co. v. Kemp*<sup>31</sup> it was held that a patent for lands issued by the United States was conclusive of legal title in an action of law and could not be collaterally impeached in such action unless absolutely void on its face or issued without authority. The reasoning of the court is so comprehensive of the entire topic that an extended quotation is justified. The court said:

“The patent of the United States is the conveyance by which the Nation passes its title to portions of the public domain. For the transfer of that title, the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determined by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of a patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus

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<sup>30</sup> See also *Sheppard v. Taylor* (5 Pet. 675); *Frelinghuysen v. Key* (110 U. S. 63); *Boynton v. Blaine* (139 U. S. 306); *La Abra Silver Mining Co. v. United States* (175 U. S. 423); *Terlinden v. Ames* (184 U. S. 270).

<sup>31</sup> 104 U. S. 636.

attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department, and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights upon different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence.<sup>32</sup>

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to a patent reaches beyond the action of a special tribunal, and goes to the existence of a subject upon which it was competent to act.

"The general doctrine declared may be stated in a different form, thus: a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed.

"On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law

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<sup>32</sup> Citing *Moore v. Wilkeson* (13 Cal. 478); *Beard v. Federy* (3 Wall. 478).



did not provide for selling them, or that they had been preserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department, upon matters properly before it, is not assailed nor is the regularity of its proceedings called into question; but its authority to act at all is denied and shown never to have existed."

#### § 1100. Postal Fraud Orders.

In *Public Clearing House v. Coyne* <sup>33</sup> was sustained the constitutionality of a congressional delegation of authority to the Postmaster-General to determine, without the aid of the courts, whether the mail of a given concern should be excluded from the mails because fraudulent or partaking of the nature of a lottery.

In this case the constitutionality of the laws providing for "fraud orders" was denied upon the grounds: First, that they provided no judicial hearing upon the question of illegality; second, that they authorized the seizure of letters without discriminating between those which might contain, and those which might not contain, prohibited matter; and third, that they empowered the Postmaster-General to confiscate the money of the addressee which has become his property by the depositing of the letter in the mails.

As to the first of these objections the court said: "It is too late to argue that the process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness." <sup>34</sup> As to the second point that the law authorized the detention of all letters of the firm, many of which may be purely personal and having no connection with the prohibited enterprise, the court said: "In view of the fact that by these sections the postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. . . . A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically the annulment of the law." As to the third objection that the Postmaster-General is authorized by statute to confiscate the money or the representative of money, of the addressee, the court said that this is based on the hypothesis, that the money or other article contained in a registered

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<sup>33</sup> 194 U. S. 497.

<sup>34</sup> Citing *Bates & G. Co. v. Payne* (194 U. S. 106).

letter becomes the property of the addressee as soon as the letter is deposited in the post-office. As to this the opinion said: "The action of the Postmaster-General in seizing the letter does not operate as a confiscation of the money, or the determination of the title thereto; but merely as a refusal to extend the facilities of the Post-Office Department to the final delivery of the letter. Congress might undoubtedly have authorized the postmaster at the depositing office to decline to receive the letter at all if its forbidden character were known to him, but as this would be impossible, we think the power to refuse the facilities of the department to the transmission of such letter attends it at every step, from its first deposit in the mail to its final delivery to the addressee; and as the character of the letter cannot be ascertained until it arrives at the office of delivery, the government may then act and refuse to consummate the transaction. If the letter and its contents become the property of the addressee when deposited in the mail, the subsequent seizure by the government would not impair his title or prevent an action by him for the amount of remittance. True, this might be of no practical value to him, but it is a sufficient reply to show that the title to the letter did not change by its seizure by the postmaster."

Though the judgment of the Postmaster-General, as granted him by statute, was thus held to be final and conclusive with reference to the issuance of fraud orders, the Supreme Court held, in *American School of Magnetic Healing v. McAnnulty*,<sup>35</sup> that the law required that this judgment should be one founded on facts ascertained by evidence, and that it might not be simply the Postmaster-General's personal judgment as to the fraudulent character of the business whose mail is to be excluded. Thus, in this case, the Postmaster-General having issued a fraud order against a corporation which assumed to heal disease through the influence of the mind, and to give advice and treatment by letter, the court declared the order not properly issued. The court said as to the claims of the complainants:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of the complainants cannot be the subject of proof as of an ordinary fact. . . . We may not believe in the efficacy of the treatment to the extent claimed by the complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but a matter of opinion in any court. . . . That the complainants had a hearing before the Postmaster-General, and that his decision was made after such hearing, cannot affect the case."

However, in *Smith v. Hitchcock*<sup>36</sup> the court held that, whether or not a publication was a book or a magazine within the terms of statutes of Congress, related to a matter of statutory construction with regard to which the court did not consider itself conclusively bound by the finding

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<sup>35</sup> 187 U. S. 94.

<sup>36</sup> 226 U. S. 53.

of the Postmaster-General, and, therefore, itself made an examination and determination of the fact.<sup>37</sup>

### § 1101. Immigration Exclusion Cases.

In the various Chinese exclusion cases the same principles as those already discussed have been applied. Inasmuch, however, as their application has involved questions of personal liberty rather than of property, their adoption by the courts has seemed to some oppressive, and in the *Ju Toy* case,<sup>38</sup> decided in 1905, earnest dissenting opinions were filed. In *Chae Chan Ping v. United States*<sup>39</sup> the court held valid the act of 1888 prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884 granting them permission to return. This the court did, even though it recognized that the act of 1888 was in contravention of express stipulations of the Treaties of 1868 and 1880 between the United States and China. In *Fang Yue Ting v. United States* the doctrine was again declared that the provisions of an act of Congress passed in the exercise of its constitutional authority must be upheld by the courts, even though in contravention of an earlier treaty. The power to exclude or expel aliens it held to be vested in the political departments of the government, and to be executed by the executive authority except so far as the judicial department has been authorized by treaty or statute to intervene, or where some provision of the Constitution has been violated. Having this right, the executive department, it was held, might be authorized to provide a system of registration and identification of Chinese laborers, and to require them to obtain certificates of residence, and to provide for the deportation of those not so obtaining certificates within a year. The provision of the act that the executive officer acting in behalf of the United States should bring the Chinese laborer before a Federal court in order that he might be heard and the facts upon which depended his right to remain in the country decided, was held valid, the duty thus imposed upon the court being declared judicial in character. "When," the opinion declared, "in the form prescribed by law, the executive officer acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant, and a judge—*actor, reus et judex*."

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<sup>37</sup> The Postmaster's finding was, however, approved. See also *Houghton v. Payne* (194 U. S. 88) and *Smith v. Payne* (194 U. S. 104).

<sup>38</sup> *United States v. Ju Toy* (198 U. S. 253).

<sup>39</sup> 130 U. S. 581.

In *Ekiu v. United States*<sup>40</sup> it was held that in reaching the determination whether an alien is lawfully entitled to enter the country, it is not necessary for the administrator to take testimony. The court, however, said: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.<sup>41</sup> And Congress may, if it sees fit, as in the statutes in question in *United States v. Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted.<sup>42</sup>

"It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor ever been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.<sup>43</sup>

"The statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record.

"The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon

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<sup>40</sup> 142 U. S. 65.

<sup>41</sup> Citing *Chew Heong v. United States* (112 U. S. 536); *United States v. Jung Ah Lung* (124 U. S. 621); *Wan Shing v. United States* (140 U. S. 424).

<sup>42</sup> Citing *Martin v. Mott* (12 Wh. 19); *Philadelphia & T. R. Co. v. Stimpson* (14 Pet. 448); *Benson v. McMahon* (127 U. S. 457); *Oteiza y Cortes v. Jacobus* (136 U. S. 330).

<sup>43</sup> Citing *Murray v. Hoboken Land & Imp. Co.* (18 How. 272); *Hilton v. Merritt* (110 U. S. 97).

him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official supervisors, and in accordance with the provisions of the Act."

In *Lem Moon Sing v. United States*<sup>44</sup> the contention was that while, generally speaking, the administrative officers might have jurisdiction under the statute to exclude an alien who was not by law or treaty entitled to enter, yet if they do exclude an alien who is legally entitled to enter, they exceed their jurisdiction and their illegal action presents a judicial question for the decision of which the courts may intervene. The Supreme Court, however, refused to sustain the contention, saying: "That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the Act of 1894 the provision that the decision of the appropriate immigration or custom's officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value."

In *United States v. Sing Tuck*,<sup>45</sup> the contention was made that the question, whether or not a person seeking admission was an alien, necessarily involved the authority of the immigration officials to act at all, and that this jurisdictional question was one which the courts could not refuse to pass upon. In this case the Supreme Court avoided passing directly upon the point, holding that the petitioner could not seek judicial remedy until he had exhausted (as he had not) the administrative remedies given him by statute. In *United States v. Ju Toy*,<sup>46</sup> however, the petitioner had carried his appeal to the highest administrative official authorized by statute to consider his claim, and the Supreme Court thereupon found itself obliged to pass upon the main contention, which it did, holding that the administrative decision as to the status of the petitioner, no abuse of authority being shown, was to be regarded as was final and conclusive. The opinion of the court consisted mainly of a review of the earlier cases which, it was alleged, covered the point at issue. As regards whether the petitioner was deprived of liberty without due process of law, the court said: "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there

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<sup>44</sup> 158 U. S. 538.

<sup>45</sup> 194 U. S. 161. A strong dissenting opinion was filed by Justices Brewer and Peckham.

<sup>46</sup> 198 U. S. 253.

while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him, due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws."

From this decision three justices dissented. Justice Brewer in an opinion concurred in by Justice Peckham declared "appalling," the doctrine of the majority that one who, unless the very point at issue be prejudged, is a citizen of the United States may, though guilty of no crime, be, by the action of a ministerial officer, and without trial by jury or other judicial examination, punished by deportation and banishment. The dissenting justices then went on to review cases in which, they asserted, is declared the doctrine that the courts will review the findings of executive officials with reference to those facts which determine their jurisdiction. The cases which were cited, however, did not determine this. They asserted that the courts will review the judgments of administrative officials as to whether their authority extends over a given subject; that is, they will review the administrative interpretation of the statute conferring authority for administrative action, but the cases do not hold that, where the administrative decision is by statute made final, they will review a decision as to whether a given person or piece of property falls within the class of persons or property over which it is admitted that authority of the statute extends. Thus, had there been a question whether the Exclusion Act of Congress applied to aliens, the courts would review the administrative decision; but, granting that it did apply to aliens, they would not review the judgment of the administrative officials as to whether or not a given individual was an alien, and, therefore, subject to expulsion or exclusion.<sup>47</sup>

Of course, if the question of alienage or citizenship is dependent upon a matter of law, and not a determination purely of fact, the matter will be reviewed by the courts. Thus, for example, in *Gonzales v. Williams*,<sup>48</sup> the court determined in the last instance whether or not a native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States was upon her arrival at a port of this country to be treated as an alien immigrant within the meaning of the act of Congress of 1891.

In *Chin Yow v. United States*,<sup>49</sup> however, a habeas corpus having been denied by the lower Federal courts, the Supreme Court, upon appeal, held that the writ should have been issued for the determination of the allegation that the petitioner had been prevented by the administrative officials from obtaining the testimony of certain witnesses in her behalf. In its opinion

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<sup>47</sup> Cf. article by Professor Powell, cited above.

<sup>48</sup> 192 U. S. 1.

<sup>49</sup> 208 U. S. 8.

the court was, however, careful to say that the only question before it was whether a fair opportunity for a hearing had been given the petitioner, and not the correctness of the determination. The court did, however, go on to say that in those cases in which it was determined that the action of the administrative body had been unfair, in that it had denied a fair hearing, it became the necessary duty of the court to determine whether, in fact, upon the merits of the case, the petitioner was entitled to enter. As to this the court said: "The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. . . . The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

#### § 1102. Deportation of Aliens.

The cases which have been considered in the immediately preceding paragraphs exhibit in the strongest manner the extent to which individual interests may constitutionally be subjected to conclusive administrative control. They do not weaken, however, the constitutional right and obligation of the courts to see that administrative proceedings must meet the requirements of due process of law, nor do they impair the right of the courts in all cases to inquire into the jurisdiction of the administrative agencies in the premises, and, in this inquiry, to examine, when they deem it proper to do so, into the correctness of the findings of the administrative agencies with reference to facts of a jurisdictional character. In *Yamataya v. Fisher*<sup>50</sup> the court said that it "must not be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

In this case it was held that due process was satisfied by an informal notice to the plaintiff that an investigation was to be had to determine whether she should be deported, although it was alleged that, because of her lack of knowledge of the English language, she did not understand the import of the questions propounded to her, and that, in fact, she did not know that these questions related to the matter of her possible deportation.

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<sup>50</sup> 189 U. S. 86.

Where, from the nature of the case, the determination of the fact at issue, as, for example, the ascertainment of the character of a commodity, which character may be ascertained by comparing it with an established standard, it has been held that a hearing is not needed.<sup>51</sup> And in *Ekiu v. United States*,<sup>52</sup> earlier referred to, it was held that the statute<sup>53</sup> did not require inspectors to take testimony, but that they might decide upon their own inspection, whether an alien immigrant was entitled to enter the country. It was, however, declared that upon habeas corpus the question could be determined by the courts whether one prevented from landing had had an opportunity to ascertain whether his detention was lawful.

In *Ng Fung Ho v. White*<sup>54</sup> it was held that the mere fact that, at the time an alien entered the United States, he could not have been deported except by judicial proceedings, did not prevent his expulsion from the country by executive order under the General Immigration Act of February 5, 1917,<sup>55</sup> passed subsequently to his entry, there being no claim that he was a citizen of the United States. "Congress," said the court, "has power to order at any time the deportation of aliens whose presence in the country is deemed hurtful; and may do so by appropriate executive proceedings."<sup>56</sup> And, later in the opinion: "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military service denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status."<sup>57</sup> . . . Where there is jurisdiction, a finding of fact by the executive department is conclusive;<sup>58</sup> and courts have no power to interfere unless there was either denial of a fair hearing;<sup>59</sup> or the finding was not supported by evidence,<sup>60</sup> or there was an application of an erroneous rule of law."<sup>61</sup>

In *United States v. Tod*<sup>62</sup> the court, while conceding that the burden of proving alienage, and therefore jurisdiction to deport, rests upon the

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<sup>51</sup> *Public Clearing House v. Coyne* (194 U. S. 497).

<sup>52</sup> 142 U. S. 651.

<sup>53</sup> 26 Stat. at L. 1084.

<sup>54</sup> 259 U. S. 276.

<sup>55</sup> 39 Stat. at L. 874.

<sup>56</sup> Citing *Bugajewitz v. Adams* (228 U. S. 585); *Lapina v. Williams* (232 U. S. 78); and *Lewis v. Frick* (233 U. S. 291).

<sup>57</sup> Citing *Ex parte Reed* (100 U. S. 13); *Re Grimley* (137 U. S. 147); *Re Morrissey* (137 U. S. 157); *Johnson v. Sayre* (158 U. S. 109).

<sup>58</sup> Citing *United States v. Ju Toy* (198 U. S. 253).

<sup>59</sup> Citing *Chin Yow v. United States* (208 U. S. 8).

<sup>60</sup> Citing *American School v. McAnnulty* (187 U. S. 94).

<sup>61</sup> Citing *Gegiow v. Uhl* (239 U. S. 3).

<sup>62</sup> 263 U. S. 149.



government, declared that deportation proceedings are civil in character,<sup>63</sup> that a person arrested on a preliminary warrant in such proceedings is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case, and that, in the instant case, the fact that the defendant had not testified in the hearing that he was a citizen or offered any evidence to that effect, had a tendency to prove that he was an alien sufficient to establish the jurisdiction of the administrative immigration agency to detain the defendant in custody pending proceedings for his deportation, and, therefore, to deprive him of a right to discharge on habeas corpus.

In *United States v. Tod* <sup>64</sup> it was held that knowledge by a defendant that printed matter distributed by him was of a seditious character, such as to justify his deportation was not a jurisdictional fact, such as is that of alienage, the determination of which by the administrative agency may be reviewed by the courts. "We do not discuss the evidence," the court said, "because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."

In *Mahler v. Eby* <sup>65</sup> it was held that absence in the warrant for deportation of a statement that an alien had been found by the administrative authority to be undesirable, and, therefore, under the act of Congress, subject to deportation, was fatal to the validity of the warrant. Quoting from another case,<sup>66</sup> the court said: "When . . . an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

In *Tod v. Waldman*,<sup>67</sup> this doctrine was reaffirmed. However, the petitioners were not discharged, but were remanded to the custody of the immigration authorities to await a hearing on appeal to the Secretary of Labor, the right to which, until then, had not been accorded the petitioners. The mere implication from the order of deportation that the administrative agency had found facts justifying such order, said the court, was not sufficient. The facts, if found, needed to be stated and made a part of the record. In *Kwock Jan Fat v. White* <sup>68</sup> it was declared that it was fully established that decisions of the Secretary of Labor as to the right of a person to enter the United States because of his American citizenship are

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<sup>63</sup> Citing *Fong Yue Ting v. United States* (149 U. S. 698); *Bugajewitz v. Adams* (228 U. S. 585).

<sup>64</sup> 264 U. S. 131.

<sup>65</sup> 264 U. S. 32.

<sup>66</sup> *Wichita R. & Light Co. v. Public Utilities Commission* (260 U. S. 48).

<sup>67</sup> 266 U. S. 113.

<sup>68</sup> 253 U. S. 454.

conclusive "unless it be shown that the proceedings were manifestly unfair, were such as to prevent a fair investigation, or show manifest abuse of the discretion committee to the executive officers by the statute,<sup>69</sup> or that their authority was not fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law."<sup>70</sup> In this case the court found that the administrative proceedings had not been characterized by all these indisputable features, and, therefore, issued a writ of habeas corpus to release the petitioner from the detention in which he was held under orders of the immigration officials and remanded the case to the District Court for trial of the merits. Generally of the functions of the administrative officials and of the courts in the premises the court said: "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

In *White v. Chin Fong*<sup>71</sup> it was held that, under the statute, a Chinese person already in the United States was entitled to a judicial, as distinguished from an administrative, hearing as to his right to remain in the country.<sup>72</sup>

### § 1103. Selective Draft Act of 1917.

In *Angelus v. Sullivan*<sup>73</sup> it was held that the finding of the Draft Board as to whether or not a conscripted person was an alien who had not declared his intention to become a citizen of the United States was conclusive, although this fact could, of course, have been regarded as a jurisdictional one so far as the Board was concerned.

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<sup>69</sup> Citing *Low Wah Suey v. Backus* (225 U. S. 460).

<sup>70</sup> Citing *Tang Tun v. Edsell* (223 U. S. 673); *Chin Yow v. United States* (208 U. S. 8); *Zakonaite v. Wolf* (226 U. S. 272).

<sup>71</sup> 253 U. S. 90.

<sup>72</sup> The administrative authorities had ordered his deportation on the ground that his original entry into the United States had been illegal.

<sup>73</sup> 246 Fed. Rep. 56.

### § 1104. Interstate Commerce.

The attitude of the courts toward the determinations of the Interstate Commerce Commission has been dealt with in the chapter in which the work of this Commission has been discussed, and, therefore, little needs to be here added to this subject. The following quotation, from *Interstate Commerce Commission v. Union Pacific R. Co.*<sup>74</sup> rendered in 1912, may, however, be given since it sums up in brief form the whole position of the court as to its authority to examine into or revise the action of the Commission:

"In cases thus far decided," said the court, "it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." <sup>75</sup>

The court then went on to say: "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' <sup>76</sup> Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

As an instance in which the court revised an order of the Commission because, in the court's opinion, based upon a wrong interpretation or application of the law may be cited the case of *Interstate Commerce Com-*

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<sup>74</sup> 215 U. S. 452.

<sup>75</sup> Citing *Interstate Commerce Commission v. Illinois* (215 U. S. 470); *Southern Pacific R. Co. v. Interstate Commerce Com.* (219 U. S. 433); *Interstate Commerce Com. v. Northern Pac. R. Co.* (216 U. S. 544); *Interstate Commerce Com. v. Alabama Midland R. Co.* (168 U. S. 144).

<sup>76</sup> *Illinois C. R. Co. v. Interstate Commerce Com.* (206 U. S. 441).

mission v. Alabama Midland R. Co.<sup>77</sup> in which it was held that the Commission had not, as it should have, taken into consideration competition between rival routes as a circumstance statutorily required in determining whether the long and short haul clause of the law had been violated.<sup>78</sup> As an instance of a case in which the court set aside an order of the Commission, because having no reasonable foundation in the evidence, is that of *Florida v. East Coast R. Co. v. United States*.<sup>79</sup>

In *Interstate Commerce Commission v. Brimson*,<sup>80</sup> in which was contested the constitutionality of that section of the Interstate Commerce Act of 1887 which authorized and required the circuit courts of the United States to use their processes in aid of inquiries before the Commission, the general doctrines regarding the circumstances under which aid may be given by the courts to administrative agencies were considered at length.

#### § 1105. Federal Trade Commission.

The attitude of the courts towards the determinations of the Federal Trade Commission have been earlier considered.<sup>81</sup>

#### § 1106. Meat Inspection.

In *Houston v. St. Louis Independent Packing Co.*<sup>82</sup> the court said that it would not disturb the finding of the Secretary of Agriculture, fairly arrived at, and based upon substantial evidence, that the use of the term "sausage" in connection with the manufacture and sale in international commerce of a product containing cereal in excess of two per cent was calculated to deceive purchasers and consumers.

#### § 1107. Extent of Administrative Discretion which May Be Constitutionally Delegated.

Generally speaking, it may be said that, while wide discretionary power may constitutionally be granted to administrative agents, that discretion must be one which must be guided by reason, justice and impartiality, and must be exercised in the execution of policies predetermined by legislative act, or fixed by the common law.

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<sup>77</sup> 168 U. S. 144.

<sup>78</sup> For other cases of a similar character in which rulings of the Commission were held improper by the court, see *United States v. B. & O. R. Co.* (231 U. S. 274); and *Southern Pac. R. Co. v. Interstate Commerce Com.* (219 U. S. 433). For a review of other cases where the findings of fact by the Commission were examined by the court, see Dickinson, *Administrative Justice and the Supremacy of Law*, Chapter VI.

<sup>79</sup> 234 U. S. 167.

<sup>80</sup> 154 U. S. 447.

<sup>81</sup> See Chapter XLVII, § 558, and especially the following cases: *Federal Trade Commission v. Gratz* (253 U. S. 421); *Federal Trade Commission v. Beechnut Packing Co.* (257 U. S. 441); *Federal Trade Commission v. Sinclair Refining Co.* (261 U. S. 463); and *Federal Trade Commission v. Curtis Publishing Co.* (260 U. S. 568).

<sup>82</sup> 249 U. S. 479.

In *Yick Wo v. Hopkins*<sup>83</sup> the court laid down the doctrine that the legislative investment of purely personal and arbitrary power in the hands of any public official is a denial of due process of law. "The very idea," said the court, "that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."<sup>84</sup> Of the ordinances in question the court said: "They seem intended to confer and actually do confer, not a discretion upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not as to places but as to persons. . . . The power given to them [the supervisors] is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance, nor restraint."

In fact, however, the court found in this case that the evidence showed that the ordinances in actual operation had been so exclusively directed against a particular class of persons "as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they were applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the law which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States." And the court added, "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The judgment of the court was that the petitioners could not be punished for a violation of the ordinances in question.

Taken by itself the language of the court, as will be seen by the quotations which have been made, indicate a view that in no case may an arbitrary discretionary power be granted to a public official which will compel any person "to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another." The force of this holding is, however, somewhat weakened by the fact that, as has been seen, the court found that, whatever the terms or intent of the ordinances in question, they had actually been administered in a grossly partial and unjust manner. And also, and more important, in the later case of *Wilson v. Eureka City*<sup>85</sup> the court expressly upheld the constitutionality of an

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<sup>83</sup> 118 U. S. 356.

<sup>84</sup> Quoting and approving *City of Baltimore v. Radecke* (49 Md. 217).

<sup>85</sup> 173 U. S. 32.

ordinance committing the right of the plaintiff with reference to the removal of a building owned by him, to the unrestrained discretion of a single official. The summary of cases in the State courts, given by the court in *Re Flaherty*,<sup>86</sup> in which unrestrained discretion is sustained, is quoted with approval, the court declaring the discretionary power to be "based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error."<sup>87</sup>

In this case it is certain that the Supreme Court committed itself to the doctrine that administrative officials may, in certain cases at least, be given a discretionary power to act according to their own unrestricted judgment as to what the circumstances require, and that, therefore, an ordinance or a law purporting to grant this authority is not, upon its face, void.

It may be predicted, however, that the grant of such arbitrary power will not be upheld except in those cases in which comparatively unimportant private interests are involved, or where the requirements of administrative efficiency demand the existence of such an authority. And, furthermore, the doctrine of *Yick Wo v. Hopkins* will of course apply in those cases where it is clearly shown that in fact the discretionary power which has been granted has been abused and oppressively or unfairly exercised.

In *American School of Magnetic Healing v. McAnnulty*<sup>88</sup> as has been

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<sup>86</sup> 105 Cal. 558.

<sup>87</sup> See also *Davis v. Massachusetts* (167 U. S. 43). The summary of cases given by the court in *Re Flaherty* is as follows:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (*Pedrick v. Bailey*, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (*Commonwealth v. Abrahams*, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (*Commonwealth v. Davis*, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (*Vance v. Hadfield*, 22 N. Y. 588); giving the right to manufacturers to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (*Sawyer v. Davis*, 136 Mass. 239); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (*Hine v. The City of New Haven*, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (*Vanderbilt v. Adams*, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (*Nightingale, Petitioner*, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (*Quincy v. Kennard*, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (*Commissioners, etc. v. Covey*, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted to do so by the superintendent or his deputy (*Commonwealth v. Brooks*, 109 Mass. 355)."

<sup>88</sup> 187 U. S. 94.

seen, a fraud order of the Postmaster-General was held not authorized by the statute under which the right to issue the order was claimed, the court holding that the law did not grant to the Postmaster-General a power to issue fraud orders except in cases where there was evidence, that is, something more than the individual opinion of the Postmaster-General, to show that the business against which the orders might be issued is a fraudulent one. The statutory power of Congress, should it see fit, to vest in the Postmaster-General a general power to exclude from the use of the mails those concerns which in his judgment he might deem to be fraudulent was thus not involved or passed upon.

## CHAPTER XCI

### DUE PROCESS OF LAW: THE DEVELOPMENT OF THE DOCTRINE

In almost every chapter of this treatise it has been necessary to refer to the constitutional requirement of Due Process of Law, which, by the Fifth Amendment, is imposed upon the Federal Government, and, by the Fourteenth Amendment, imposed upon the States.<sup>1</sup> The specific and detailed discussion of this requirement has, however, been postponed to the present and immediately following chapters.

The cases in which the Supreme Court of the United States has found it necessary to examine the scope and application of this general limitation upon government power run into the hundreds, and, if those in the lower Federal and the State courts be regarded, they run into the thousands. No attempt will be made to examine all these cases, or even all of those decided in the Supreme Court, for, to do so, would be to usurp the place of a digest or of such an encyclopedic work as that of *Corpus Juris*.<sup>2</sup> The attempt will, however, be made to examine and discuss all those cases which have served to throw light upon the essential meaning of this fundamental feature of American constitutional jurisprudence, and to illustrate the various ways in which, substantively or procedurally, it has been applied. It is, therefore, believed that from the analysis and exposition which follows the reader can obtain a knowledge that will be reasonably adequate for a correct application of the doctrine to such juridical situations as have not been discussed or to such new situations as may, in the future, arise.

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<sup>1</sup> See especially Chapter CI for the discussion of Due Process of Law and the Regulation of Interstate Commerce.

<sup>2</sup> For general treatises on Due Process of Law, see McGehee, *Due Process of Law* (1906) and Mott, *Due Process of Law* (1926).

The author desires to acknowledge his especial indebtedness, in dealing with this subject, to scholarly articles by Professors E. S. Corwin and T. R. Powell, among which may be noted: "The Basic Doctrine of American Constitutional Law" (12 *Mich. Law Rev.* 247), "The Doctrine of Due Process of Law before the Civil War" (24 *Harvard Law Rev.* 366, 460) and "The Supreme Court and the Fourteenth Amendment" (7 *Mich. Law Rev.* 643) by Professor Corwin; and "Judicial Review of Administrative Action in Immigration Proceedings" (22 *Harvard Law Rev.* 360), "Administrative Exercise of the Police Power" (24 *Harvard Law Rev.* 268, 333, 441), "The Constitutional Issue in Minimum Wage Legislation" (2 *Minn. Law Rev.* 1), "The Workmen's Compensation Cases" (32 *Political Science Quarterly*, 542), and "The Oregon Minimum Wage Cases" (32 *Political Science Quarterly*, 296), by Professor Powell.



**§ 1108. Has "Due Process" the Same Meaning in the Fifth which It Has in the Fourteenth Amendment?**

The meaning of the phrase "due process of law," as employed in the Fifth Amendment, would seem to have the same meaning as employed in the Fourteenth Amendment. However, in *Wight v. Davidson*<sup>3</sup> we find the court saying: "It by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling State legislation." This observation in the majority opinion was vigorously dissented to by Justice Harlan in an opinion concurred in by Justices White and McKenna. "It is inconceivable to me," Justice Harlan said, "that the question whether a person has been deprived of property without due process of law can be determined upon principles applicable to the Fourteenth Amendment, but not applicable to the Fifth Amendment, or upon principles applicable under the Fifth Amendment, and not applicable under the Fourteenth Amendment. The intimation to the contrary in the opinion of the court is, I take leave to say, without any foundation upon which to rest, and is most mischievous in its tendency."

In a case decided at the same time as the foregoing case, namely, *French v. Barber Asphalt Co.*<sup>4</sup> the court, referring to the Fifth and Fourteenth Amendments, said: "It may be that questions may arise in which different constructions and applications of their provisions may be proper." It would appear, however, that no such contingency has as yet arisen. In *Twining v. New Jersey*,<sup>5</sup> the court said: "If any different meaning of the same words as they are used in the Fourteenth Amendment [and in the Fifth Amendment] can be conceived, none has as yet appeared in a judicial decision."

**§ 1109. Corporations Protected.**

Corporations, equally with natural persons, are protected against deprivation of life, or property without due process of law.

The first statement by the Supreme Court that corporations are entitled as regards their property to the protection of the provision of the Fourteenth Amendment with regard to due process of law and the equal protection of the laws, was in *Santa Clara Co. v. Southern Pac. R. Co.*<sup>6</sup> in which the court said that it did not wish to hear argument upon the question as all of the justices were of opinion that the protection applied.<sup>7</sup>

<sup>3</sup> 181 U. S. 371.

<sup>5</sup> 211 U. S. 78.

<sup>4</sup> 181 U. S. 324.

<sup>6</sup> 118 U. S. 394.

<sup>7</sup> For reaffirmations, see *Covington & L. Turnpike Co. v. Sandford* (164 U. S. 578); *Smyth v. Ames* (169 U. S. 466); *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation* (262 U. S. 544).

The life of a corporation, that is, its right to existence as a legal entity or person, is protected against arbitrary destruction.<sup>8</sup> It would seem, however, that its liberty, so far as it is not included under its right to life and property, is not protected by the due process of law provisions. At any rate we find the court saying in *Northwestern National Life Ins. Co. v. Riggs*:<sup>9</sup> "The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons." This case involved a State law somewhat restricting the liberty of the corporation to contract, which the court upheld as a legitimate police or governmental measure.

Requiring, however, for their existence and their powers the positive act of the political power, there is opened up to the State a means by which a control may be exercised over them far beyond that which is constitutionally possible over the natural individual. This avenue of authority, of course, is through the reservation of regulative powers by the State at the time that the charters of incorporation are granted. Having the right to give or to withhold such charters the State may attach to their granting such conditions as it may see fit.

A State may not, however, as a condition precedent to a grant, obtain a control which trenches upon a matter reserved exclusively to Federal regulation as, for example, of interstate commerce; nor may it so exercise a reserved right of charter amendment as to work deprivation of property without due process of law. Subject to similar limitations, States, when admitting foreign corporations to do business within their borders may condition that permission upon an agreement upon the part of the admitted corporations to forms of control which otherwise the State would not be competent to exert over private industries or employments. The right of the States to predicate admission to, or continuance to do business within their borders upon an agreement upon the part of corporations not to avail themselves of a Federal right, as, for example, to sue in the Federal courts, or, upon their forbearance in fact to exercise this right, is elsewhere considered.

#### § 1110. Aliens as Well as Citizens Are Entitled to Due Process of Law.

There is no question, as has appeared in the discussion of administrative proceedings for their exclusion or deportation, that aliens are entitled to the constitutional protection against deprivation of life, liberty or property without due process of law.<sup>10</sup> However, in the absence of congressional provision therefor, there may be some question as to the opportunity that

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<sup>8</sup> *Monongahela Nav. Co. v. United States* (148 U. S. 312). In this case it was held that corporate franchises could not be taken for a public purpose without just compensation.

<sup>9</sup> 203 U. S. 243.

<sup>10</sup> See § 1101.

an alien, prior to entrance into the United States, would have to assert this right in judicial proceedings. In fact, however, Congress has made provision for the testing by an alien of his right to enter the country. The decision as to this right may, indeed, be determined by administrative agencies, but the alien has a right to resort to the courts if there is claim upon his part that he has not had, procedurally speaking, due process of law, or that the administrative agency has, in other ways, exceeded or departed from its statutory authority. Except for this statutory provision, it would be possible to hold that acts of the government, alleged to be torts against aliens, outside the country should be treated as "Acts of State." In such cases the question of fact would arise whether an alien upon a ship entering an American harbor or territorial water, or even after landing on American soil, but prior to a recognition of his right to enter the country, would be deemed to be within the territorial jurisdiction of the United States so as to exclude the application of the doctrine of "Acts of State" even in its most restricted sense.

#### § 1111. Due Process and Other Specified Personal Rights.

The specific enumeration in the Fifth Amendment of other personal rights furnishes possible ground for arguing that such enumerated rights are not included within the general provision as to due process of law, but it is sufficiently established that this is not the case. In other words, the scope of due process of law is to be determined independently of the specific guarantee of other rights. Thus, in *Chicago, etc., R. Co. v. Chicago*,<sup>11</sup> due process of law was held to prevent the States from taking private property for a public use without just compensation, without regard to the fact that this is specifically forbidden in the Fifth Amendment.

#### § 1112. Due Process of Law May Be Waived.

A party who has freely consented to a process or jurisdiction cannot afterwards claim that he had been denied due process of law. Thus, in *Pierce Oil Corporation v. Phoenix Refining Co.*,<sup>12</sup> a foreign corporation which had obtained the privilege of conducting a pipe line business in a State whose laws at the time provided for large supervisory powers over such business could not claim that it was denied due process of law by reason of such supervision. "The contention," said the court, "that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself made after notice and full hearing, deprives it of property without due process of law must be pronounced futile to the point almost of being frivolous." And, later in the same opinion: "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the

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<sup>11</sup> 166 U. S. 226.

<sup>12</sup> 259 U. S. 125.

right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right.”<sup>13</sup>

### § 1113. Development of the Doctrine of Due Process of Law.

Though the words “due process of law” have not a long history, the doctrine implied by them has a history in Anglo-American law which extends for more than seven hundred years—back, indeed, to the signing of Magna Carta. And yet, notwithstanding this long period during which countless opportunities have presented themselves for its application and judicial definition, the doctrine has not yet received a statement in such a form that its specific applications can, in all cases, be determined. This failure has been due, not to any lack of judicial effort or acumen, but to the very nature of the doctrine which, asserting a fundamental principle of justice rather than a specific rule of law, is not susceptible of more than general statement. The result is, that the meaning of the phrase has to be sought in the history of its specific applications, and, as the variety of these possible applications is infinite, it will probably never be possible to say that the full content of that meaning has been determined. In *Twining v. New Jersey*,<sup>14</sup> we find the court saying: “Few phrases in the law are so elusive of exact apprehension as this. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.” So also in *Davidson v. New Orleans*,<sup>15</sup> the court said: “to define what it is for a state to deprive a person of life, liberty or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.” And, later in the same opinion: “There is wisdom in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such discussions may be founded.”

In *Holden v. Hardy*<sup>16</sup> the court said: “This court has never attempted to define with precision the words ‘due process of law.’ It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”

It would appear, then, that a complete knowledge of the meaning of the doctrine of due process of law in American constitutional jurisprudence

<sup>13</sup> Citing *Pierce v. Somerset R. Co.* (171 U. S. 641); *Wall et al. v. Parrot Silver and Copper Mining Co.* (244 U. S. 407).

<sup>14</sup> 211 U. S. 78.

<sup>15</sup> 96 U. S. 97.

<sup>16</sup> 169 U. S. 366.

can be obtained only by a study of every case in which its application has been sought. However, true as this statement may be, it is possible for the commentator to escape, in a measure, from the necessity of describing these cases *seriatim* by grouping them under general topical heads. Also, in default of a possible definition which will be both comprehensive and of practical value in the determination of specific cases, it will be possible for the commentator to state certain more or less fundamental and therefore generally guiding principles which the courts have declared to be applicable in cases in which there is a claim that due process of law has not been accorded to one or another of the parties litigant. These more or less general or fundamental principles have revealed themselves for the most part, not in single cases, but as an evolutionary result from series of cases.

The foregoing observations sufficiently show that, to a peculiar extent, it is necessary that the history of the development of the doctrine of due process of law should be traced.

#### § 1114. *Per Legem Terræ.*

The historical antecedents of the phrase "due process of law" may be clearly traced back to the expression *per legem terræ* as it occurs in the Charter wrung by the Barons from King John. The 39th chapter of that document provides that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land" (*per legem terræ*). In the later reissues and reaffirmations of this charter by Henry III, in 1216, 1217 and 1225, this provision was repeated, with, however, in the issues of 1217 and 1225, the addition of the words after disseized, "of his freehold, or liberties, or free customs," (*de libero tenemento suo vel libertatibus, vel liberis consuetudinibus suis*).

The words of Magna Carta, *per legem terræ*, probably had at this time the technical meaning that no civil or criminal plea should be decided against a freeman until he had been given the opportunity to furnish the customary "proof" which the law, as it then stood, recognized and permitted him to offer. This proof might be by battle, or ordeal, or by compurgation. Whatever form it might assume it was technically known as a law (*lex*), that is, as a test according to which the defendant's claim was to be upheld or denied.<sup>17</sup>

In the various petitions of the Parliament in the Fourteenth Century against the arbitrary acts of the King's Council, the guaranty of the law of the land was appealed to, and these petitions, when assented to by

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<sup>17</sup> McKechnie, *Magna Carta*, 102, 441-442; Thayer, *Evidence*, 200; Bigelow, *History of Procedure*, 155. Thayer and Bigelow are cited by McKechnie.

the King, became, of course, statutes of the realm. Thus, in 1331, in Stat. 5 Edw. III, C. 9, it was declared that "no man from henceforth shall be attacked by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods nor chattels seized into the King's hands against the form of the Great Charter and the law of the land." So again, in 1351, in Stat. 25, Edw. III, C. 4, it was declared that "from henceforth none shall be taken by petition or suggestion made to our lord the King or his Council, unless it be by presentment or indictment of his good and lawful people of the same neighborhood, where such deeds be done, in due manner, or by process made by writ original at the common law, nor that none be ousted of his franchises, nor of his household, unless he be fully brought in to answer and forejudged of the same by the courts of the law." Still again, in 1355, in Stat. 28, Edw. III, C. 3, there was a substantially similar provision, and there, for what would appear to be the first time, we have the modern phrase employed. "No man," it was declared, "of what state or condition soever he be, shall be put out of his lands, or tenements, nor taken, nor imprisoned, nor indicted, nor put to death, without he be brought in to answer by due process of law" (*par due proces de lei*).<sup>18</sup>

It is thus apparent that in these petitions and statutes of Edward III, the phrases "due process of law" and "the law of the land" had come to be synonymous, both indicating, as the substance of the petitions shows, that the guaranty insisted upon was that persons should not be imprisoned except upon due indictment, or without an opportunity on their parts to test the legality of their arrest and detention, and that their property should not be taken except in proceedings conducted in due form in which fair opportunity was offered to the one claiming ownership or right to possession to appear and show cause, if any, why the seizure should not be made.

The Petition of Right of 1628, approved by Charles I, recited various arbitrary acts complained of, and appealed to "the laws and franchises of the realm." Coke, in his Second Institute, defined the phrase *per legem terræ* as meaning "the common law, statute law or custom of England," and then declared: "For the true sense and exposition of these words, see the Statute 37, Edw. III, C. 8, where the words 'by the law of the land' are rendered 'without due process of law,' for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his freehold without due process of law; that is by indictment or presentment of good and lawful men where such deeds be done or by writ original of the common law."<sup>19</sup>

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<sup>18</sup> Cf. McGehee, *Due Process of Law*, Chap. I.

<sup>19</sup> This statement is hardly correct, the last clause, while occurring in Stat. 37, Edw. III, C. 8, not being contained in the Charter itself.

It was in this sense as employed in the statutes of Edward III and by Coke, and as relating solely to matters of procedure, that the phrase due process of law was introduced into American law.

In *Murray v. Hoboken Land, etc., Co.*,<sup>20</sup> the court declared: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Carta. Lord Coke in his commentary on these words (2 Inst. 50) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal Constitution follow the language of the Great Charter more closely, generally containing the words 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, used the same words. The Constitution of the United States, as adopted, contained the provision that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' When the fifth article of amendment, containing the words in question, was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for the mode of trial in civil and criminal cases. To have followed, as in the State constitutions, and in the ordinance of 1787, the words of Magna Carta, and declare that no person shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause 'law of the land,' without the immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Carta had declared to be the true meaning of the phrase 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning."

Certain of the requirements of due procedure, and especially that which provides for a hearing before judgment, were, in English constitutional thought, conceived to be of so fundamental a character, and so essential to the administration of true justice, that an attempt upon the part of Parliament to abolish them would have been held revolutionary and, in the English sense of the word, unconstitutional. Indeed, the view had a certain amount of acceptance that such action would be beyond the strict legal power of Parliament. This doctrine, whatever historical or legal basis it may earlier have had, had, however, been definitely repudiated by the middle of the seventeenth century.<sup>21</sup> It is clear, then, that in

<sup>20</sup> 18 How. 272.

<sup>21</sup> See especially the valuable work of McIlwain, *The High Court of Parliament*. Blackstone, writing in 1765, says: "It [Parliament] hath sovereign and uncontrollable authority in the making, conferring, enlarging, restraining, abrogating, repealing, renewing, and expounding of laws concerning matters of all possible denominations, ecclesiastical or

1776 the principle of due process as it had developed in England, operated only as a restraint upon the executive and the courts; that is, as the words themselves import, the requirement related only to matters of procedure.

#### § 1115. English and American Use of the Phrase "Due Process of Law" Contrasted.

Coming now to American practice we find that the exact phrase "due process of law" was not employed in any of the eleven State constitutions adopted prior to the Federal Constitution, but that it early found expression in substance, if not in very words, in those instruments. The very words do, however, appear in the Declaration of Rights of the State of New York, adopted in 1777, and in one of the amendments proposed by that State to the Federal Constitution as drafted by the Convention of 1787. The first appearance of the express provision in an American instrument of government is in the Fifth Article of Amendment to the Constitution of the United States, adopted in 1791. That Amendment provides, *inter alia*, that "nor shall any person . . . be deprived of life, liberty or property, without due process of law." The Federal imposition of this requirement upon the States did not come until 1868 when the Fourteenth Amendment was ratified.

It is a very remarkable fact that not until our written Constitution was more than half a century old did the phrase receive an interpretation and application which approximates that which it has to-day, and not, indeed, until a hundred years had passed away was resort had to it as the usual device of those disapproving of the acts of their legislatures.<sup>22</sup> This, however, is no doubt in a measure explainable by the fact that not until the increased complexity of social and industrial life had led, upon the one hand, to the use by the State and Federal governments of administrative process more or less summary in character and, upon the other hand, to a

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temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must, in all governments, reside somewhere, is entrusted by the constitution of these Kingdoms. . . . It can, in short, do everything that is not naturally impossible. . . . That which the Parliament doth, no authority upon earth can undo." *Commentaries*, I, 161.

For Coke's dictum as to the supremacy of the fundamental principles of the common law, see *Bonham's case* (8 Coke's Rep. 118).

<sup>22</sup> Professor Corwin calls attention to the fact that between 1868 and 1889, twenty-one years, but seventy-one cases were tried in the Supreme Court of the United States involving an application of the entire Fourteenth Amendment; whereas, between 1890 and 1901, one hundred and ninety-seven such cases arose; and, also, that while the American Digest for 1887 contained but eleven items upon due process of law out of two hundred and seventy-four items upon the subject of constitutional law, the Digest for 1902 contains one hundred and nine items upon due process out of a total of four hundred and seventy constitutional items. Articles, "Due Process of Law Before the Civil War," in *Harvard Law Review*, XXIV, 370, 460. The author is greatly indebted to these scholarly articles, a general acknowledgment of which he wishes here to make.



marked increase in the regulative control of law over private acts and the use of public property, did there appear the necessity for the appeal to this limitation by those who conceived themselves injured by the exercise of such administrative powers or by the enforcement of these legislative regulations.

In two most important respects the application in America of the requirement of due process of law has differed from that which it had received in England prior to 1776, and which, indeed, it still receives in that country. These are: (1) that, in the United States, it operates as a limitation upon the legislative as well as upon the executive branch of the government, and (2) that it relates to substantive as well as to procedural rights. This second application is, however, one which, as we shall see, was not at first developed.

Before the requirement could be recognized as one imposed upon the legislature there had first to be established the doctrine that the courts, when called upon to apply the enactments of the law-making branch of the government of which they themselves constitute the judiciary, may declare the invalidity of enactments which, in their judgment, conflict with the provisions of the written Constitution. This doctrine, as is well known, was not accepted without protest, but may be said to have received final and decisive sanction as a fundamental principle of American constitutional jurisprudence in the great opinion of Marshall, rendered in 1803, in the case of *Marbury v. Madison*,<sup>23</sup>

That, as contrasted with English practice, the requirement of due process of law was a limitation upon the legislative power, so far, at least, as to render void an enactment authorizing a taking of life, liberty or property by an arbitrary or otherwise defective procedure, seems early to have been held, the argument being founded upon the obvious fact that, as contrasted with the English constitutional documents, American written instruments of government and their accompanying Bills of Rights have for their primary aim the delimitation of the powers of all the departments of government,—of the legislative as well as the executive and judicial.<sup>24</sup> In *Hurtado v. California*,<sup>25</sup> decided in 1884, the argument that the provisions of our Bills of Rights restrain the legislature is given in full,—the distinction between English and American constitutional doctrines in this respect being emphasized. The court said: "The concessions of Magna Carta were

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<sup>23</sup> 1 Cr. 137.

<sup>24</sup> See *Zylstra v. Corp. of Charleston* (1 Boy. [S. C.] 384); cited by Corwin.

<sup>25</sup> 110 U. S. 516. See also *Murray v. Hoboken Land and Improvement Co.* (18 How. 272), decided in 1856, in which it was held that the due process of law limitation applies to the legislative as well as the executive and judicial branches of the government. In that case the court said "The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law', by its mere will."

wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the Barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that the bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's case* (8 Coke, 115, 118) the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty, against legislative tyranny, was the power of a free public opinion represented by the Commons. In this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachment of power delegated to their governments, and the provisions of *Magna Carta* were incorporated in Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . . It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or particular case but, in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,'<sup>26</sup> so 'that every citizen shall hold his life, liberty and property, and immunities, under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of persons and property of its subjects, is not law, whether manifested as the decrees of a personal monarch or of an impersonal multitude."<sup>27</sup>

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<sup>26</sup> *Argument in Dartmouth College v. Woodward* (4 Wh. 518).

<sup>27</sup> It is interesting to note that the tendency was at first to restrict the inhibitions of the Fourteenth Amendment to the legislatures, thus reversing the English practice which restricted the provisions of *Magna Carta* and the Bills of Rights to the executive and the courts; and that it is only since *Ex parte Virginia* (100 U. S. 339); that it has been clearly held that the courts and the executive agents or the states may not, by arbitrary acts upon their part, deprive persons of life, liberty and property without due process of law or deny to them the equal protection of the laws. In that case the court said: "A state acts by its legislature, and its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean, that no agency of the state . . . shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position, under a state of government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition."

### § 1116. Early Reliance on Natural Rights or Inherent Limitations on Governments.

It does not appear to have been urged in these earlier cases that a law which provided a proper mode of procedure for its enforcement might be held void because in effect it operated, or might operate, to deprive the individual of a vested property right without due compensation made, or his life, liberty or property taken without justifiable excuse. By the Federal Constitution the States were forbidden to enact laws impairing the obligation of contracts, and this limitation was early held to apply to executed as well as to executory contracts, and to contracts to which the State was a party, as well as to contracts between private individuals;<sup>28</sup> and by the Dartmouth College case<sup>29</sup> charter grants were construed to be contracts upon the part of the State, the obligation of which might not be impaired by later legislation. By the Federal Constitution the States were further forbidden to enact *ex post facto* laws, but this restriction was early held in *Calder v. Bull*<sup>30</sup> to apply only to criminal laws. Thus, as far as limitations imposed by the Federal Constitution were concerned, all substantive private rights, except in so far as these might be founded upon contracts, were at the mercy of the State legislatures. The possibility, under a popular form of government, of oppression in the form of laws enacted by their own representatives, does not appear to have been keenly felt by the people. So far, however, as it was apprehended, the early view seems to have been that the restraints of natural law would be operative, according to the doctrine that the law-making branch of every government is inherently without the power arbitrarily and oppressively to invade the sphere of private rights of persons and property. This natural law doctrine, though it can never be said to have gained a definite establishment, even for a time, nevertheless received frequent *obiter* assertion, and its influence was for a long time seen in discussions of our higher courts. Thus, for example, in 1875, in *Loan Association v. Topeka*<sup>31</sup> the court said: "It must be conceded that there are such rights in every free government beyond the control of the state,—a government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is, after all, but a despotism. . . . The theory of our governments, state and municipal, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without

<sup>28</sup> *Fletcher v. Peck* (6 Cr. 87).

<sup>29</sup> *Dartmouth College v. Woodward* (4 Wh. 518).

<sup>30</sup> 3 Dall. 386.

<sup>31</sup> 20 Wall. 655.

which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D, or which should enact that the homestead now owned by A should henceforth be the property of B.”<sup>32</sup>

**§ 1117. Development of the Doctrine that Due Process Includes Protection of Substantive as Well as of Procedural Rights.**

Disregarding certain earlier cases which, to the discerning, might have indicated what was to be the course of development, but which can hardly be said to have established the doctrine, we come to a series of cases decided by the New York courts in the early fifties in which it was definitely stated that due process is a matter of substantive as well as of procedural right. Thus, in *Westervelt v. Gregg*<sup>33</sup> decided in 1854, the court said of the measure under consideration: “such an act as the legislature may, in the uncontrolled exercise of its power, see fit to pass, is in no sense the due process of law designated by the Constitution.” Finally, in the important case of *Wynehamer v. New York*<sup>34</sup> decided in 1856, there was overturned an act of the State which forbade the sale of intoxicating liquors except for medicinal purposes, and which provided that, when not intended for such sale, these liquors should not be stored in any place but a dwelling house, and that, as nuisances, they might be seized and destroyed by summary process. The argument of the court was that the destruction of liquors already in existence at the time of the enactment of the measure would be unconstitutional “even by the forms which belong to due process of law.” Justice Hubbard, in his opinion of the court, after declaring himself “opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside of the Constitution,”<sup>35</sup> went on to say: “The fault of the present law is that it does not profess to be a scheme of regulation. There is no attempted discrimination between liquor owned at the time the law took effect and that acquired afterwards. . . . In this aspect I will, in a few words, give my views of the constitutionality as it respects vested rights of property in liquor, under the original law which forbids the citizen being deprived of his property without due process of law. . . . The Constitution surrounds liquor, as property, with the same inviolability as any other species of property. . . . I think it competent for the legislature to declare a forfeiture of liquor, which an offender may have in possession,

<sup>32</sup> See § 42 for a fuller consideration of this case.

<sup>33</sup> 12 N. Y. 202.

<sup>34</sup> 13 N. Y. 379.

<sup>35</sup> See also as to this the concurring opinion of Comstock, J.

as a mode of punishment. . . . But the portion of the law which authorizes the seizure and destruction of liquor, where the prosecution or correction of the owner is not contemplated, I should not hesitate to pronounce void, as property is thus destroyed or the citizen deprived of it without due process of law. . . . Liquor is not a nuisance *per se*, nor can it be made so by a simple legislative declaration.”<sup>36</sup>

The significance of this case is, as Professor Corwin points out, that while in earlier cases the court had had the opportunity of treating questioned enactments, as bills of pains and penalties, it had here to deal with a penal statute which, for the most part at least, provided procedure for its enforcement which was not open to question.

Although there was thus stated in the *Wynehamer* case the doctrine which was ultimately to prevail in all of our courts, Federal and State, its general acceptance was not immediate. Indeed, for a time at least, it was either disregarded or openly repudiated. In *Scott v. Sandford*<sup>37</sup> decided in 1857, we find Taney saying that: “an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself and brought his property into a particular territory of the United States and who had committed no offense against the laws, could hardly be dignified with the name of due process of law;” but this ground for holding the Missouri Compromise Act of 1820 void had not been even suggested by counsel, and but two of his associates agreed with the Chief Justice as to this.

In 1869, in the first legal tender case,<sup>38</sup> we find for the first time the Federal Supreme Court stating definitely that the due process of law clause as it is found in the Fifth Amendment restrains the legislative power of Congress with reference to substantive as well as procedural rights. This declaration was, however, made in such a manner as to render it essentially *obiter* in character, and to make it plain that it is not the chief reliance of the court in holding void the law of Congress which was questioned in that case, for it was brought in only after the invalidity of that measure had already been declared upon other grounds, and was, in fact, not discussed until the clearly untenable argument had been advanced that the act was void as in violation of the “spirit of the Constitution.” The argument of the court in this case shows, indeed, so clearly the very slight weight attached to the limitation of due process with reference to the protection of substantive rights against legislative infringement, that it deserves a short analysis.

The crucial point involved in this case was as to the constitutionality of the Legal Tender Act of Congress as applied to debts created prior to its enactment and made payable in gold or silver coin. Having first deter-

<sup>36</sup> Cf. *Lawton v. Steele* (152 U. S. 133).

<sup>38</sup> *Hepburn v. Griswold* (8 Wall. 603).

<sup>37</sup> 19 How. 393.

mined that it was the intention of Congress to make the law applicable to these prior created debts, the court devoted its argument to determining whether the power thus sought to be exercised by Congress could be related to some power expressly granted to Congress and thus brought within the doctrine of implied power as declared in *McCulloch v. Maryland*.<sup>39</sup> The power to coin money, to issue currency, and to carry on war, were successively examined with a negative result. This was decisive of the case, but the court, apparently eager still further to justify itself, went on to hold the act void upon a ground which, the justices said, "seems to us decisive, to whatever express power the supposed implied power in question may be referred." This is, that it violates the "spirit of the Constitution." After adverting to the fact that the States are forbidden by the Constitution "to pass any law impairing the obligation of contracts," they said: "It is true that this prohibition is not applied in terms to the government of the United States. Congress has express power to enact bankruptcy laws, and we do not say that a law made in the execution of any other express power which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason. But we think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the whole body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law, which necessarily and in its direct operation, impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." That the law in question, as applied to debts created prior to the enactment of the law and made payable in gold and silver, would operate to impair their obligation was, of course, easily shown. Finally the court raised the question whether the act might not be held to fall within the express prohibition of the Fifth Amendment as to the depriving of property without due process of law. As to this the court said: "No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred, would not come within the prohibition against arbitrary privation of property. We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept in satisfaction of all contracts for money half or three quarters, or any other proportion less than the whole value actually due, according to their terms. It is difficult to conceive what act would take private property without due process if such an act would not."<sup>40</sup>

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<sup>39</sup> 4 Wh. 421.

<sup>40</sup> In *Knox v. Lee* (12 Wall. 457), *Hepburn v. Griswold* was overruled, the acts of Congress being upheld as a legitimate mode of exercising the war powers of Congress.

In the Slaughter House cases, decided in 1873, the question of due process received only the briefest possible attention. Indeed, the court pointed out that the argument had not been pressed that the law under attack was void upon this ground, and declared: "It is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade of the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." <sup>41</sup>

In *Davidson v. New Orleans*,<sup>42</sup> decided in 1878, the doctrine, though *obiter* in that case, may be said definitely to have been accepted by the Supreme Court that substantive rights of life, liberty and property are protected by the due process of law limitation against legislative deprivation. It is extremely interesting to study the mode of reasoning by which, in this case, this conclusion was reached. Shortly stated it was that a legislative act which arbitrarily controls the actions of the individual or the use by him of his property, and still more one which destroys his title to property and transfers it to another individual, amounts to a judgment against him, which judgment is, of course, one rendered in a proceeding which lacks the essentials of due process of law procedurally considered. And this reasoning, it must be admitted, still remains the only means by which the field of substantive rights may logically be brought under the operation of a limitation which, by its very words and historical application, is purely procedural in character.

In the *Davidson* case the court said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation. It seems to us that a statute which declared in terms and without more, that the full and exclusive title of a described piece of land, which is now in A, should be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."

That the process of judicial reasoning in the *Davidson* case was such as has been described is evidenced not only by the remainder of the court's opinion in that case, but by its declaration in the later case of *C., B. & Q. R. R. Co. v. Chicago*.<sup>43</sup> In that case, after referring to the suppositious

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Finally, in *Juilliard v. Greenman* (110 U. S. 421), the right of Congress to issue legal tender notes was sustained as implied in the power to borrow money and, therefore, exercisable in times of peace as well as of war. As thus justified, the acts were held to be no longer open to attack upon the ground that they were in violation of the due process prohibition.

<sup>41</sup> 16 Wall. 36.

<sup>43</sup> 166 U. S. 226, decided in 1897.

<sup>42</sup> 96 U. S. 97.

law mentioned in the Davidson case, and just referred to, the court continued: "Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coördinate departments, and committing to the judiciary expressly, or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation." Here it is abundantly clear that the objection to the act was based upon the ground that it amounted to a judgment without a trial and thus operated as a denial of due process upon the procedural side.

In *C., B. & Q. R. R. Co. v. Chicago* the court also referred, in support of its position, to *Missouri Pacific R. R. Co. v. Nebraska*,<sup>44</sup> in which case a law was held void which required a railroad company to surrender a portion of its land to private individuals for the erection and maintenance thereon of grain elevators. This, the court said, "is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public." This is, in essence and effect, a taking of private property of the railroad company for the private use of the petitioners. And, the court declared: "The taking by a State of the private property of one person or corporation, without the owner's consent, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

In 1877, the year before the decision of *Davidson v. New Orleans*, the court had been called upon to decide the case of *Munn v. Illinois*,<sup>45</sup> one of the so-called Granger cases.

In this famous case was questioned the constitutionality of a certain law of the State of Illinois fixing maximum charges for the storage of grain that might be made by elevator companies at Chicago and other places in the State. The chief ground upon which this alleged unconstitutionality was rested was that the act operated as a deprivation of liberty and property without due process of law.

At the outset of the argument, in refutation of this claim, the court showed that it had not yet fully shaken off the doctrines of natural rights and the social compact. "When one becomes a member of society," it declared, "he necessarily parts with some rights or privileges which, as an individual not affected by his relations with others, he might retain."

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<sup>44</sup> 164 U. S. 403.

<sup>45</sup> 94 U. S. 113.



The preamble of the Constitution of Massachusetts, which defines a body-politic as "a social compact of which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good," is then quoted with approval. "This," the court said, "does not confer power upon the whole people to control rights which are purely and exclusively private." Apparently, then, the court would hold that, apart from specific constitutional provision, a legislature, even though representative of the whole people, is inherently limited as to the control of purely private rights. The court, however, continued, "But it [the social compact] does authorize the establishment of laws requiring each citizen so to conduct himself and so use his own property as not unnecessarily to injure another. This is the very essence of government and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as said by Chief Justice Taney in the License Cases, 'are nothing more nor less than the powers of government inherent in every sovereignty . . . that is to say . . . the power to govern men and things.'" "From this it is apparent," the court declared: "that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation."

The court then pointed out that the law in question was in regulation of industries "affected with a public interest" and that as such they were subject to a control the same as that which has for centuries been exercised over services of a public character.

Fundamentally it would appear that the court was here considering the inherent limits to the legislative power, and was concerned simply with the question whether a law or attempted law which transcends these limits may properly be said to be valid. This became very evident when the question as to the extent of the legislative power within the field open to police regulation was discussed. The power to fix rates, whether of public services or of industries affected with a public interest, was declared to be a matter of legislative discretion which the courts might in no wise control. "The controlling fact," it was declared, "is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule which requires the charge to be reasonable is itself a regulation as to price. But a mere common law regulation of trade or business may be changed by statute. . . . To limit the rate of charge for services rendered by a public employment, or for the use of property in which the public has an interest, is only changing a

regulation which existed before." "We know," the court added, "this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislation the people must resort to the polls, not to the courts." <sup>46</sup>

In effect, then, the court held that the due process of law requirement, interpreted in the light of inherent limitations upon legitimate legislative power in a free government, operates only to prevent an invasion, except by way of a legitimate exercise of the police power, of purely private rights, and that where a right is not purely private it becomes subject to public control by way of the regulation of charges that may be exacted by public employments or industries affected with a public interest, and that within this field of regulative control the discretionary authority of the legislature is practically without limit. Purely private rights are thus wholly exempted from public control except by way of police regulation while those not thus wholly private are at the mercy of the legislative will. Due process of law is thus held to mark off a certain sphere of interests from legislative control, but not to operate as a restraint upon the legislative authority when exercised within the field of legislation reserved to it. <sup>47</sup>

It was not very long, however, before the necessities of the cases, as revealed in various State statutes brought before it, led the Supreme Court to modify the broad statement made in the *Munn* case that in re-

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<sup>46</sup> The same doctrine was declared in the other Granger cases decided at the same time. In *C., B. & Q. R. R. Co. v. Iowa* (94 U. S. 155) it was said: "The railroad must carry, when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge it operates upon this corporation the same as it does upon individuals engaged in a similar business. . . . The company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislatures for protection against wrong under the form of legislative regulation." So also, in *Peck v. C. & N. R. Co.* (94 U. S. 164), it was declared: "When property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." See also *C., M. & St. P. R. Co. v. Ackley* (94 U. S. 179), and *Ruggles v. Illinois* (108 U. S. 526). In *C., B. & Q. R. R. Co. v. Iowa* (94 U. S. 155) it was declared that the regulative power of the State is not lost by non-user, and in *Stone v. Farmers' L. & T. Co.* (116 U. S. 307) that this right can not be granted away by implication, but only by express grant.

<sup>47</sup> In the dissenting opinion of Justice Field this doctrine was especially emphasized, the protection of property being declared to be the same as that extended to life or liberty, the rights of all three needing to be liberally construed. Justice Field's dissent was based upon the denial of the doctrine that private property used in such a manner as to affect the community at large ceases to be *juris privati*, and becomes subject to police regulation as to the charges that may be made for the services rendered. He declared that the regulation of such rates may not be justified as an exercise of the State's police powers.

viewing State statutes in regulation of public service corporations and industries affected with a public interest, as well as statutes passed in the exercise of the police power the sole question open to judicial determination is whether the acts in question lie within the field open to legislative control. In the Railroad Commission cases (*Stone v. Farmers' L. & T. Co.*),<sup>48</sup> the court found it expedient to declare: "From what has been said it is not to be inferred that this power of limitation or regulation is itself without limit. The power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for a public use without just compensation or without due process of law."

This modification of the doctrine of the *Munn* case, though it was not admitted by the court to be a modification, was, in truth, of great significance. It asserted a judicial power of revision where none had before been claimed. To be sure this judicial restraining power was claimed only as to rates legislatively fixed so low as to be actually confiscatory in effect, that is, lower than the actual cost of rendering the services for which the rates were imposed; but only a few years later, in *Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota*,<sup>49</sup> the court took the further step, logically involved in the doctrine of the Railroad Commission cases, of asserting its authority to declare illegal, as a taking of property without due process of law, a rate which, though not so low as not to yield a net return of profit, is yet unreasonable in the sense that it will not yield to the company a due return upon its invested property. The court said: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits for their invested capital, the company is deprived of the equal protection of the law."

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<sup>48</sup> 116 U. S. 307 (1886).

<sup>49</sup> 134 U. S. 418. Bradley, Gray and Lamar, JJ., dissented, on the ground that the doctrine disclosed in *Munn v. Illinois* controlled. This, it may be remarked, was the first case in which the protection of the XIV Amendment was extended to any person other than a Negro or an Asiatic.

### § 1118. Reasonableness.

The doctrine thus declared has never since been disturbed and has been repeatedly affirmed, the only question giving rise to controversy being as to the criteria for determining reasonableness. There was at first a disposition to distinguish between those rates which were fixed directly by the legislature and those fixed by commissions acting under a general authority granted them by the legislature,<sup>50</sup> but this distinction, clearly without legal weight, was soon abandoned.<sup>51</sup>

In the *Covington* case the Supreme Court reversed the lower court (which had overruled a demurrer and granted a perpetual injunction restraining the company from exacting charges in excess of those established by a legislative act) and squarely asserted its authority to hold invalid, when unreasonably low, rates fixed by statute. Whether or not the rates involved were in fact invalid it was, of course, not necessary for the court then to determine.

In *Holden v. Hardy* there was an explicit statement to this effect.<sup>52</sup>

In *Adair v. United States*<sup>53</sup> the provision of the law of Congress of June 1, 1898, making it a criminal offence for an agent of an interstate carrier to discharge an employee from service because of his membership in a labor union, was held void as an unconstitutional invasion of personal liberty. The idea of reasonableness was again emphasized, the court saying, with reference to the *Lochner* case: "Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of the opinion that the business referred to in the

<sup>50</sup> *Budd v. New York* (143 U. S. 547).

<sup>51</sup> *Reagan v. Farmers' Loan & T. Co.* (154 U. S. 362) (1894); *Covington, etc., Co. v. Sandford* (164 U. S. 578) (1896). The only distinction that may logically be made between rates fixed by a commission created by the legislature and those established by the legislature itself is that the point may possibly be raised with reference to the former that when the rates are unreasonably low, the commission may be held to have exceeded the discretionary power entrusted to it by the legislature which, in default of express provision otherwise, may be presumed not to have intended to endow its agent, the commission, with the authority to establish rates unreasonably low; and, secondly, that possibly there is a stronger presumption in favor of the reasonableness of a rate fixed by a legislature than of one declared by an administrative body.

<sup>52</sup> 169 U. S. 366. The court said: "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a State law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

<sup>53</sup> 208 U. S. 161.

New York statute was such as to require regulation and that, as the State was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the court as a valid exercise of the State's power to care for the health and safety of its people. While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the function of government, at least, in the absence of contract between the parties, to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or compel any person, against his will, to perform personal services for another."

In *Smyth v. Ames*, decided in 1898,<sup>54</sup> the court, for the first time, felt itself warranted in holding void because in its judgment, unreasonably low, rates directly fixed by the legislature itself. In its opinion in this case the earlier discussions were carefully reviewed and the doctrine, as established by them, declared to be as follows: "A State enactment or regulation, made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not permit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of his property without due process of law, and deny it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States"; and that "while rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question as to whether they are so unreasonably low as to deprive the carrier of such compensation as the Constitution secures, cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

#### § 1119. Reasonableness a Matter for Final Determination by the Courts.

In *Chicago, M. & St. P. R. Co. v. Minnesota*<sup>55</sup> the court said: "The construction put upon the Statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the Statute, that the rates recommended and published by the Commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable

<sup>54</sup> 169 U. S. 466.

<sup>55</sup> 134 U. S. 418.

charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the Statute, the rates published by the Commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the Statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the Commission. In other words, although the Railroad Company is forbidden to establish rates that are not equal and reasonable, there is no power in the hands of the courts to stay the hands of the Commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the Railroad Company. It deprives the Company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. . . . The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

#### **§ 1119a. Reasonableness of Rates of Railway and Other Public Services.**

Because of its importance, the author feels justified in repeating, in substance, what he has previously said <sup>56</sup> with regard to the distinction between unreasonable and confiscatory rates.

A distinction is to be made, between first, the power of the courts to enforce the common law obligation of public services and of industries affected with a public interest to maintain rates which will not be extortionate, that is, which will be reasonable as regards the public; second, as to the power of the courts, according to American constitutional principles, to determine the validity of rates fixed by legislatures; and third, the function of the courts to determine the validity of rates fixed by administrative bodies which have been legislatively empowered so to do, but with the requirement that the rates thus fixed shall be just and reasonable. As regards the first of these three judicial functions, it is to be noted that

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<sup>56</sup> See § 517.

it extends no further than the restraining of the services from fixing and enforcing rates which will be unduly oppressive or extortionate, that is, unreasonable, as regards the public. As regards the matter of legislatively fixed rates, the judicial function extends no further, under American constitutional principles, than to determine whether these rates are so unreasonably low as to be unjust to the companies rendering the services and thus to operate, as to them, as a taking of property without due process of law. Such legislatively fixed rates may not be questioned by the courts upon the ground that they are too high, and, therefore, oppressive to the public, for it is the peculiar province of a legislature to determine what is just and reasonable as regards the public. When, however, the courts are called upon to examine the validity of rates fixed by administrative bodies acting under a legislative authority so to do, but under a legislative mandate that the rates so fixed shall be just and reasonable, the situation is a different one. Here, the courts may, and, in fact, are obligated, when the matter is presented to them in proper form, to examine these rates not only as regards their reasonableness and justness to the companies rendering the services, but as regards also their reasonableness or justness to the public. Thus, it is competent for the courts to hold a given rate to be illegal because so low, under all the circumstances of the case, as not to yield a reasonable percentage return to the company upon the fairly valued property used by it. The courts may also hold such an administratively determined rate to be so high as to be unduly oppressive or extortionate to the public. It is, however, to be noted that, in fact, the courts have seldom, if ever, found it necessary to hold an administratively fixed rate invalid upon this last ground. However their power so to do has been repeatedly asserted.

From the foregoing it is seen that, as already pointed out, a rate may be deemed to be a reasonable one, if fixed directly by a legislature, however much it may exceed one which would satisfy the constitutional requirement that property shall not be taken without due process of law. And, even as to rates fixed under legislative mandate by administrative bodies, there is possible a considerable range of reasonableness above the confiscatory point. In other words, such an administratively fixed rate does not become unreasonable, as viewed from the standpoint of the public, because it exceeds, to some extent, the minimum that would be required in order to prevent it from being confiscatory in character.

The foregoing observations have been made because the courts, in the reasoning contained in the opinions which they have rendered, have not always emphasized the distinctions which have been pointed out, with the result that their various declarations, considered apart from such distinctions, have not always appeared to be harmonious, or, at any rate, not easily analyzable in order to determine the exact propositions intended to be contained in them.

### § 1120. Reasonableness and the Police Power.

This right of the courts to pass judgment upon the reasonableness of legislative regulations, as illustrated in their review of rates and other regulations established for the control of public service corporations and industries affected with a public interest, has likewise become well established with reference generally to enactments by legislatures in the exercise of their so-called police powers. Here, as in the case of the fixing of rates, the courts have reserved to themselves not only the authority to determine whether or not a measure sought to be justified as a police regulation may properly be upheld as such, but also, at times, the competency to determine whether the police regulation, granting it to be such, is a reasonable one, the end sought and the amount of interference with private rights entailed, being both considered. The leading decisions of the courts with reference to the police power will be considered in a later chapter.<sup>57</sup>

In *Lochner v. New York* <sup>58</sup> Justice Peckham said: "In every case that comes before this court, therefore, where legislation of this [police] character is concerned and where the protection of the Federal court is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?"

One important fact is to be noticed regarding this assumption by the courts of the authority to examine as to the reasonableness of the exercise by the legislatures of powers acknowledged to be possessed by them. This is that it necessarily brings the judgment of the court and that of the legislature into conflict upon mere matters of fact, and these, too, matters of fact which have guided the law-making branch in the exercise of its legislative discretion. Thus, in determining whether or not a legislatively determined railway rate, when put into effect, will yield a fair return to the carrier company, not only does the court have to answer this upon the basis of simple fact, but it has to determine what, under all the surrounding circumstances, are the criteria to be applied for determining reasonableness. It is true that the courts still assert that they have no concern with the wisdom, or policy, or abstract justice, of the statutory measure examined by them, nor with the motives of the lawmakers, but, in fact, as is clearly evident, there is opened the way to a court, when judging as to the reasonableness of a law, to substitute its judgment for that of the legislature as to the expediency of the measure, and it is because of this very substitution that the courts have been subjected to frequent criticism. This criticism, so far as it may justly be made, can be avoided by the courts only by a rigid adherence to the doctrine which, in principle, they

<sup>57</sup> See § 1120.

<sup>58</sup> 198 U. S. 45.



accept as binding, that every possible doubt regarding the validity of a statute is to be resolved in its favor, and that, therefore, a law is to be held void only in case it is impossible for the court to find evidence sufficient to lead a rational person to believe in the reasonableness of the measure under examination. In the *Lochner* case<sup>59</sup> the court held that no sufficient evidence had been presented to show that the law under consideration would, if upheld and applied, have a beneficial influence, or any influence at all upon the health or the morals of the employees in bakeries, or would protect those employees against fraud, or in any direct sense advance the welfare and convenience of the public. In *Adair v. United States*<sup>60</sup> the court, as one of the grounds for holding void an act of Congress, declared that whether or not an employee upon an interstate railway is a member of a labor union is a fact that has no bearing upon the manner in which the railway is conducted and, therefore, that the law in question, which forbade such employees to be refused employment, or discharged from employment because of membership in a union, was not a regulation of interstate commerce and, therefore, not a law supported by the commercial power of Congress.

To the author it seems that, in the *Adair* case, the court hardly gave to the law in question that benefit of doubt which it deserved as to the possible relationship in fact between the regulation it sought to impose and the efficiency and safety of interstate railway transportation. In *Laurel Hill Cemetery v. San Francisco*<sup>61</sup> the court, in the author's opinion, stated a more satisfactory doctrine when, with regard to the constitutionality of a municipal ordinance forbidding the burial of the dead within the city limits, it said: "If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. . . . The extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. . . . The plaintiff must wait until there is a change of practice, or at least an established consensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold."

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<sup>59</sup> See *post*, § 1173.

<sup>60</sup> 208 U. S. 161.

<sup>61</sup> 216 U. S. 358.

## CHAPTER XCII

### DUE PROCESS OF LAW AND JUDICIAL PROCEDURE

In this chapter will be considered due process of law upon its purely procedural side.

It has already been shown that it is only upon its procedural side that the requirement of due process has been of significance in English constitutional and political history: and it is a fact which deserves comment that practically all the attempts from the time of Magna Carta to the present day which Englishmen have made to oppose their individual rights to governmental control, have taken the form, not so much of substantive limitations upon legislative control or of the control of the government in general, as of statements of the manner in which, that is, the procedure by which, the rights of life, liberty and property of the individual may be subjected to political control.

It is quite proper, then, in our attempt to determine the procedural requirements in the United States of the constitutional provision as to due process of law, to resort at times to the meaning which this phrase had historically come to have in the country from which we received it. Thus, as the Supreme Court has said, the specific content of the phrase is largely to be ascertained by "an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."<sup>1</sup>

#### § 1121. Due Procedure Not Immutable.

But this historical method of determining the meaning of the phrase is not to be exclusively resorted to, or, when resorted to, the court concluded thereby. That is to say, the fact that a given procedure is not to be found accepted in English and prior American practice is not to be held as conclusively determining it not to be due process of law. If the procedure under examination can be shown to preserve the fundamental characteristics and to provide the necessary protection to the individual, which the Constitution was intended to secure, its novelty will not vitiate it. Thus in *Hurtado v. California*,<sup>2</sup> in which substitution by the State of prosecution by information in lieu of indictment was recognized as valid,

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<sup>1</sup> *Twining v. New Jersey* (211 U. S. 78).

<sup>2</sup> 110 U. S. 516.

the court declared that a true philosophy of American personal liberty and individual right permits "a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give from time to time new expression and greater effect to modern ideas of self-government;" and that "this flexibility or capacity for growth and adaptation is the peculiar boast and excellence of the common law." "If follows," the argument concluded, "that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." And in *Twining v. New Jersey*<sup>3</sup> the court declared that to adopt the principle that a procedure established in English law at the time of the emigration and brought to this country and practiced here by our ancestors is necessarily an element in due process of law would be to fasten the procedure of the first half of the seventeenth century upon American jurisprudence like a straight jacket which could only be unloosened by constitutional amendment. It would be, as declared by Justice Matthews in *Hurtado v. California*, "to deny every quality of the law but its age, and to render it incapable of progress or improvement."<sup>4</sup>

As has been already pointed out, it is not possible to give a precise and comprehensive definition of due process of law. However in *Twining v. New Jersey*<sup>5</sup> in which this was declared, the court went on to say: "There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of *Magna Charta* which provides that 'no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by lawful judgment of his peers, or by the law of the land.'"<sup>6</sup>

In *Hagar v. Reclamation Dist.*<sup>7</sup> it was said: "It is sufficient to say that by due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law, it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore, means that there can be no pro-

<sup>3</sup> 211 U. S. 78.

<sup>4</sup> See also *Holden v. Hardy* (169 U. S. 366).

<sup>5</sup> 211 U. S. 78.

<sup>6</sup> Citing *Murray v. Hoboken Land Co.* (18 How. 272); *Davidson v. New Orleans* (96 U. S. 97); *Jones v. Robbins* (8 Gray, 329); *Cooley, Const. Lim.*, 7th ed., 500; *McGehee, Due Process of Law*, 16.

<sup>7</sup> 111 U. S. 701.

ceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

"By the law of the land," said Webster in a much quoted paragraph, "is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not law of the land."<sup>8</sup>

In *Missouri Pacific Ry. v. Humes*<sup>9</sup> the court, with reference to the limitations laid by the due process clause of the Fourteenth Amendment upon the States, said: "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

#### **§ 1122. Opportunity for a Hearing.**

In other sections of the present work the force of the due process of law requirement with reference to notice and hearing in administrative proceedings is considered. The present section will have regard to this requirement with reference only to proceedings before or in the courts.

From the general characterizations of due process which have been already quoted, it will have been seen that an essential element of due process of law is that the parties whose personal or property rights may be affected by any judgment, verdict, or decree that may be rendered or given by a court shall have had "his day in court." This means: (1) that he shall have had due notice, which may be actual or constructive, of the institution of the proceedings by which his legal rights may be affected; (2) that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence; (3) that the tribunal in or before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality; and (4) that it is a court of competent jurisdiction.

#### **§ 1123. Jurisdiction Essential to Due Process of Law: Service of Process outside the State.**

There has never been any question that due process of law is denied when rights of person or property are attempted to be regulated by courts or other governmental agencies which have not jurisdiction of the parties or of the

<sup>8</sup> *Dartmouth Coll. v. Woodward* (4 Wh. 518).

<sup>9</sup> 115 U. S. 512.

subject matter or of both. It is also established, as elsewhere discussed,<sup>10</sup> that a State of the Union can exercise no jurisdiction outside its territorial limits.<sup>11</sup>

It is a general jurisdictional doctrine, which will be later discussed<sup>12</sup> that service of process upon a defendant within the jurisdiction of a State is required by due process of law in order that a judgment *in personam* may be rendered.<sup>12a</sup> However, it would seem that, in the case of residents of the State, this service may be merely a constructive one, namely, by mail or publication, or by substitution, or by leaving notice at the last known address of the person to be served. As regards this constructive service it would seem that due process requires only that such reasonable effort be made as is possible to have the notice brought to the attention of the one to be served. Constructive service, whether upon residents or non-residents is sufficient to support a judgment *in rem*. Whether or not a constructive service on residents will support a judgment *in personam* which will be valid not only within the State in which rendered, but also entitled to recognition in other States under the Full Faith and Credit Clause of the Federal Constitution, is not so clear. That a personal judgment rendered in a State court against a non-resident of the State, without personal service upon him within the State or his appearance in the action upon service by publication is without validity even in the State in which rendered has been usually regarded as having been decided in *Pennoyer v. Neff*.<sup>13</sup> However, it is not clear that that case is authority for more than the proposition that such judgments need not be recognized by the courts of the other States or by the Federal courts; and the fact is that such judgments are rendered and held binding by the courts of some States, although in other States they are held to be wholly invalid as denials of due process of law.<sup>14</sup>

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<sup>10</sup> See § 1274.

<sup>11</sup> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by the court, an illegitimate assumption of power, and be resisted as a mere abuse." *Pennoyer v. Neff* (95 U. S. 714). Citing *D'Arcy v. Ketchum* (11 How. 165).

It would appear that the court held this principle to be one deducible from the very nature of political authority, that is, one that would exist independently of any constitutional provision, and, indeed, the fact is that the State judgment in this case, the validity of which was in question had been rendered prior to the adoption of the Fourteenth Amendment, and, therefore, prior to the time when the States were prohibited by Federal constitutional provision, from denying due process of law.

<sup>12</sup> See Chapter CIII.

<sup>12a</sup> As to the effect of a false return of service, see *Miedrich v. Lauenstein* (232 U. S. 236). See also note in 28 *Yale Law Journal*, 579.

<sup>13</sup> 95 U. S. 714.

<sup>14</sup> For extended discussion of constructive service in its relation to due process of law, see the notes in 50 L. R. A. 585, and 35 L. R. A. (new series) 292. In the latter of these notes the writer says: "While some of the language employed by Justice Field in his

In *McDonald v. Mabee*,<sup>15</sup> the court said:

"There is no dispute that service by publication does not warrant a personal judgment against a nonresident. *Pennoyer v. Neff*, 95 U. S. 714; *Riverside & D. River Cotton Mills v. Menefee*, 237 U. S. 189. Some language of *Pennoyer v. Neff* would justify the extension of the same principle to absent parties, but we shall go no farther than the precise facts of this case require. When the former suit was begun, Mabee, although technically domiciled in Texas, had left the State, intending to establish his home elsewhere. Perhaps in view of his technical position and the actual presence of his family in the State, a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a State, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done. We repeat, also, that the ground for giving subsequent effect to a judgment is that the court rendering it had acquired power to carry it out; and that it is going to the extreme to hold such power gained even by service at the last and usual place of abode.

"Whatever may be the rule with regard to decrees concerning status or its incidents (*Haddock v. Haddock*, 201 U. S. 562), an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it (201 U. S. 567, 568). If the former judgment had been sued upon in another State by the plaintiff, we think that the better opinion would justify a denial of its effect."

In § 606 is discussed the requirement in certain of the States that non-residents operating motor vehicles within the State shall be construed to have appointed certain State officials as their agents to receive notice of proceedings instituted in the State growing out of accidents in which such vehicles are concerned.

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opinion in *Pennoyer v. Neff* to which most of the subsequent cases resort for support for their conclusions as to jurisdiction *in personam* upon constructive or substituted service, may lend color to the view that the principles there declared apply to judgments *in personam* against residents as well as those against non-residents, it is significant that each of the headnotes which, as appears from the footnote reference to the case as published in 24 L. ed. 565, were prepared by Justice Field himself—that embodies the principle that jurisdiction *in personam* cannot rest upon constructive or substituted service is in terms confined to non-residents. And it will be noticed especially that the 5th headnote is not an unqualified declaration that process from one State cannot run into another, but that 'it cannot run into another State and summon parties *there domiciled* to leave its territory and respond to proceedings against them.' And the same headnote adds that 'publication of process or notice within the State in which the tribunal sits cannot create any greater obligation upon the *non-resident* to appear.' "

<sup>15</sup> 243 U. S. 90.

**§ 1124. Impartial Tribunal.**

As regards the requirement of impartiality and honesty of the court it may be said that this may be questioned only when there is evidence of actual fraud or if, from its very constitution or personnel, the judges would appear, either to lack honesty, or to be personally interested in the outcome of the causes litigated before them to an extent that will tend to impair their impartiality.

This latter consideration was involved in *Tumey v. Ohio*<sup>16</sup> in which it was held that an accused was denied due process of law when subjected to a trial before a judge who, under the law, received twelve dollars as costs for convictions for violations of the liquor law, and whose receipts from this source amounted to about one hundred dollars a month. The court, after citing cases establishing the general rule that officers acting in a judicial or *quasi*-judicial capacity are disqualified to sit in controversies in the outcome of which they are interested, said that nice questions, however, often arise as to the degree or nature of the interest to be deemed disqualifying, and that, under some circumstances, there are no judges available who are not to some degree personally interested in cases to be adjudicated. Matters of kinship, personal bias, State policies, remoteness of interest, said the court, would seem to be left to legislative discretion as to whether they should be deemed to be disqualifying factors. "But," said the court, "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." This fundamental doctrine, the court went on to say, could not be overcome by an alleged necessity of administering justice in inferior courts by justices whose compensation should be provided by fees or costs leviable in cases of conviction. The court found that there were State cases in which such a practice had been upheld, but, after a general review of the authorities, said: "From this review we conclude that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice, either at common law or in this country, that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim '*de minimis non curat lex*.'" "

The court, furthermore, found that due process of law had been denied by reason of the general scheme adopted by the State which was one to stimulate by financial inducements its small local authorities to secure convictions under the prohibition law.<sup>17</sup>

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<sup>16</sup> 273 U. S. 510.

<sup>17</sup> The court said: "But the pecuniary interest of the mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant

**§ 1125. Fraud.**

When fraud is shown to have been present in a judicial proceeding, due process of law is of course denied.<sup>18</sup>

**§ 1126. Bias or Prejudice.**

Section 21 of the Judicial Code provides:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed

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here. The statutes were drawn to stimulate small municipalities, in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the state and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial, and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias, or willful disregard of duty by the trial court. It specifically authorizes the village to employ detectives, deputy marshals, and other assistants to detect crime of this kind all over the county, and to bring offenders before the mayor's court, and it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court. The mayor represents the village and can not escape his representative capacity. On the other hand, he is given the judicial duty first of determining whether the defendant is guilty at all, and second, having found his guilt, to measure his punishment between \$100 as a minimum and \$1000 as a maximum for first offences, and \$300 as a minimum and \$2000 as a maximum for second offences. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? . . . It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him cannot be said to violate due process of law. The minor penalties usually attached to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact. The difference between such a case and the plan and operation of the statutes before us is so plain as not to call for further elaboration."

<sup>18</sup> Hall, in a note to his *Cases on Constitutional Law* (1st ed., p. 293) refers to the following cases containing *dicta* to this effect. *Chicago, M. & St. P. R. Co. v. Minnesota* (134 U. S. 418); *Louisville & N. R. Co. v. Kentucky* (183 U. S. 503); *C., B. & Q. R. Co. v. Babcock* (204 U. S. 585); *Ross v. Stewart* (227 U. S. 530).



no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists. . . . No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

In *Berger v. United States*<sup>19</sup> the question was raised whether, upon the filing of an affidavit as provided for in this section, the judge should at once retire from the case, or whether he could exercise a judgment upon the facts affirmed in order to determine their disqualifying force and the validity of the belief alleged to be based upon them. It was held that there was left to the judge no duty other than to pass upon the legal sufficiency of the affidavit (subject to appellate review and assuming the facts alleged to be true), to show the disqualifying bias or prejudice. If such legal sufficiency appears, the judge is compelled to retire.

#### § 1127. Court Must Be Free from outside Duress.

In *Frank v. Mangum*<sup>20</sup> it was conceded that due process of law is denied to a person tried and convicted by a court overawed and dominated by threats of mob violence or by other forms of outside duress.<sup>21</sup> However, in this case, the Supreme Court held that it was not justified in releasing the plaintiff in error from State custody upon such ground when it appeared that he had made the same allegations before the highest appellate court of the State, which court was not alleged to have been itself subjected to threats or other outside duress, and which court had decided that the trial court had not, in fact, been overawed to the prejudice of the accused. This finding of fact by the State's highest court, the Supreme Court held, upon grounds of comity, should not be reviewed by itself. The court said: "The prohibition [of denial of due process of law] is addressed to the State; if it is violated, it makes no difference in a court of

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<sup>19</sup> 255 U. S. 22.

<sup>20</sup> 237 U. S. 309.

<sup>21</sup> The court said: "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

the United States by what agency of the State this is done; so, if a violation be threatened by one agency of the State, but prevented by another agency of higher authority, there is no violation by the State. . . . It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him."

To the claim that the disorder which had attended the trial in the lower court had operated to dissolve that court and render the proceeding *coram non judice*, the Supreme Court said: "The argument is not only unsound in principle, but is in conflict with the practice that prevails in all the States. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court, or as rendering the proceedings *coram non judice*, in any such sense as to bar further proceedings. . . . The Georgia courts in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law."

It is clear that, in this case, the Supreme Court gave an almost conclusive character to the decision of the appellate court of the State that the facts did not show that the trial court had been so overawed by threats of mob violence as to prevent a trial that could properly be spoken of as providing due process of law. The Federal Supreme Court had the power, if it had desired to exercise it, to ask that the entire record of the proceedings in the trial court be supplied to it,<sup>22</sup> and then to make an examination of the facts as thus presented in order to arrive at a judgment of its own as to whether in fact, the petitioner had had a trial that would satisfy the requirements of due process of law. It is the author's opinion that this should have been done,—that the petitioner was constitutionally entitled to have such a review when the point at issue was as to the very validity of the proceedings in the trial court as tested by Federal constitutional requirements.<sup>23</sup>

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<sup>22</sup> For unexplained reasons this had not been supplied by the petitioner.

<sup>23</sup> Justices Holmes and Hughes, in their dissenting opinion, said: "When the decision of the question of fact is so interwoven with the decision of constitutional right that the one necessarily involves the other, the Federal court must examine the facts. Otherwise the right will be a barren one." Citing *Kansas City Southern R. Co. v. C. H. Albers Commission Co.* (223 U. S. 573); and *Norfolk and Western R. Co. v. Conley* (236 U. S. 605).

In *Moore v. Dempsey* <sup>24</sup> the court was presented with much the same situation and claim as had been presented in *Frank v. Mangum*, and, without expressly overruling the doctrine of that case, arrived at substantially the conclusion urged upon the court by the dissenting justices in the *Frank* case.

In *Moore v. Dempsey*, the petitioners—five negroes convicted of murder in a State court and sentenced to death—alleged, as had been alleged in *Frank v. Mangum*, that the trial court, at the time of the trial, had been so dominated by threats of mob violence as to have deprived them of due process of law. Motion for a new trial upon this ground had been made and overruled, and, upon appeal, this judgment had been sustained by the appellate court of the State.<sup>25</sup> It is, however, to be observed that the appellate court, in its opinion did not assert, as a finding of facts shown by the record, that the petitioners had had a fair trial, but merely that the alleged facts did not show that necessarily there had not been a fair trial. It thus appears that there had not been such an affirmative finding of facts by the State court as had been found by the State court in *Frank v. Mangum*. Furthermore, and of more importance, the allegations of facts by the petitioners had to be assumed as true by the Supreme Court since the case had come to it by appeal from the order of a lower Federal court dismissing, upon demurrer, a writ of habeas corpus.<sup>26</sup> Thus, so far as comity was concerned, all that the Supreme Court was called upon to do was to decide whether it should review the finding of the State court that the alleged facts, upon their face, did not show that a fair trial in the court below had been impossible. The Supreme Court, however, did not stress this point. Nor did it make any serious attempt to distinguish the instant case from that of *Frank v. Mangum*. It referred to the fact that, in that case, it was recognized that if there was an actual interference by a mob with the due course of justice which was not corrected by the State, there was a denial of due process of law to a defendant, and then said: "We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an

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<sup>24</sup> 261 U. S. 86.

<sup>25</sup> It was also urged that there had been discrimination against the petitioners as shown by the exclusion of colored men from the jury. The appellate court of the State held that this claim of discrimination had been made too late to be entertained.

<sup>26</sup> The lower Federal judge had certified that there was probable cause for allowing an appeal.

immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

Concluding its opinion, the court said: "We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the State proceedings undisturbed."

Justices McReynolds and Sutherland dissented in the Moore case upon the ground that the decision of the majority represented an unjustified and regrettable departure from the doctrine of the Frank case. "Under the disclosed circumstances," said Justice McReynolds who delivered the dissenting opinion, "I cannot agree that the solemn adjudications by courts of a great State, which this court has refused to review, can be successfully impeached by the mere *ex parte* affidavits made upon information and belief of interested convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system."

To the author, as to the dissenting justices, it seems difficult to view the holding of the court in Moore v. Dempsey otherwise than as a departure from the doctrine of the Frank case. It is, indeed, true that the discharge of the writ of habeas corpus by the District Court had been upon demurrer, which, of course, admitted the facts alleged, but the mandate of the Supreme Court was not simply that this order for the discharge of the writ should be reversed, but that the case should stand for hearing before the District Court which was thus directed to find whether the facts alleged were true or whether they could be so far explained as to leave the States proceedings undisturbed.

One thing would seem to be certain, and that is that the Supreme Court will not consider itself concluded by determinations of fact by the highest appellate courts of a State, whether upon grounds of comity or other grounds, when there is an allegation, supported by evidence of a *prima facie* character, that the appellate courts themselves have been either dominated or unduly swayed by threats of mob violence or by any other forms of outside pressure which can be said to amount to duress.

### § 1128. Fixed Interpretation of Laws by the Courts Not Guaranteed.

It has been held that due process of law does not protect the individual who, in obedience to an interpretation given by executive officers to a statute, takes action which is later held by the courts to be unwarranted by that statute. Thus, with reference to a State tax law the court in Thompson v. Kentucky<sup>27</sup> declared: "Due process of law does not assure to a tax-

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<sup>27</sup> 209 U. S. 340.

payer the interpretation of laws by the executive officers of a State as against their interpretation by the courts of a State, or relief from the consequences of a misinterpretation by either. . . . It is the province of the courts to interpret the laws of the State, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security."

In *Patterson v. Colorado* <sup>28</sup> the court said: "There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong, or because earlier decisions are reversed."

#### § 1129. Erroneous Determination of Facts or of Law by Courts.

It is established that the guaranty to suitors of due process of law does not furnish to them a right to have decisions of courts reviewed upon the mere ground that such decisions have been based upon erroneous findings of fact or upon erroneous determinations of law. Such errors, if committed by trial courts, can be corrected only by ordinary appellate proceedings as provided for by law. Especially has this doctrine been declared in cases in which the Federal courts have been asked to review the decisions of State courts. In *Sauer v. New York* <sup>29</sup> the court said: "We are not concerned primarily with the correctness of the rule adopted by the Court of Appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the Court of Appeals had. It was the duty of that court to ascertain, declare, and apply the law of New York, and its determination of that law in conclusive upon this court."

In *Thomas v. Texas*,<sup>30</sup> the court said, with reference to an alleged discrimination by administrative officials against negroes because of their race or color: "Whether such discrimination was practised in this case was a question of fact, and the determination of that fact adversely to the plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal constitution, which cannot be presumed."

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<sup>28</sup> 205 U. S. 454.

<sup>29</sup> 206 U. S. 536.

<sup>30</sup> 212 U. S. 278.

In *McGovern v. New York* <sup>31</sup> the court said: "No one would contend that a plaintiff could come under the Constitution simply because of an honest mistake to his disadvantage [by the court] in laying down the rule of damages for conversion. . . . When property is taken by eminent domain, it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally."

Again, in a more recent case, <sup>32</sup> the court said: "It is firmly established that a merely erroneous decision given by a State court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." <sup>33</sup>

It scarcely needs be said that the Federal courts do not hold themselves bound by decisions of the State courts as to whether or not, in specific cases, due process of law has been denied by judicial, legislative or administrative State action. The immunity from such deprivation being a distinctively Federal right, the Federal courts will exercise their own independent judgment as to whether the right has been violated. Thus, in *Scott v. McNeal*, <sup>34</sup> a case coming to the Supreme Court by writ of error to review the judgment of the highest court of a State upon the ground that the judgment therein denied due process of law to the plaintiff in error, the Federal court held that it was "no more bound by that [the State] court's construction of a statute of the Territory or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute."

In this case the State court had held, that, under a State statute, the appointment by a probate court of an administrator of the estate of a person, believed dead, but in fact alive, was valid as to him, although he had received no notice thereof. "No judgment," the Federal Supreme Court said, "is due process of law, if rendered without jurisdiction in the court or without notice to the party."

As to the correctness of this last statement there can be no doubt, but it will be observed that the Supreme Court did not hold that, because the

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<sup>31</sup> 229 U. S. 363.

<sup>32</sup> *American Railway Express Co. v. Kentucky* (273 U. S. 269).

<sup>33</sup> Citing *Arrowsmith v. Harmoning* (118 U. S. 194); *Iowa Central Ry. Co. v. Iowa* (160 U. S. 389); *Tracy v. Ginzberg* (205 U. S. 170); *Bonner v. Gorman* (213 U. S. 86); *McDonald v. Oregon R. R. & Nav. Co.* (233 U. S. 665).

<sup>34</sup> 154 U. S. 34.

State law, as interpreted by the State court, permitted this to be done, it was to be held void. Rather, it held that it would not follow the decision of the State court which gave to the State law this effect. In short, the Federal court, in effect, said that the State court had, by an erroneous decision of what the State law was, deprived the plaintiff in error of property without due process of law.

It is to be observed, however, that this error upon the part of the State court was one which permitted the State probate court to exercise jurisdiction over a party over whom it had not obtained jurisdiction, and that thus an essential requirement of due process upon its procedural side was disregarded. The case was not, therefore, one in which the Federal court held that a mere error of State law upon the part of a State court, whether by way of a misconstruction of a statute, or the reversal of an earlier construction of a statute, or a novel determination of the common law, operated as a denial to the defeated party of his right to the benefit of the State law at the time his right of action or other property right accrued.

In *Chicago, B. & Q. R. Co. v. Chicago*,<sup>35</sup> the only question was whether, by an award sustained in a State court of one dollar of damages to the plaintiff company as compensation for valuable property taken for a public use, it had been deprived of property without due process of law. The Federal court held such to be the case, saying: "In our opinion, a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is, under principle and authority, wanting in due process of law required by the Fourteenth Amendment."

The Supreme Court in its opinion in this case admitted that the original verdict might not unreasonably be taken as meaning that, in the opinion of the jury, the company's property proposed to be taken was not materially damaged, and that, in so far as this estimate was one of fact, it was not subject to revision on writ of error. But the court pointed out that the jury had acted under instructions from the Supreme Court of the State, which instructions practically controlled its determination, and these judicial instructions the Federal Supreme Court held to have been improper and to have resulted in the taking of property for a public use without due process of law.<sup>36</sup>

Here again, it is plain that, as in *Scott v. McNeal*, the Federal court declined to follow the decision of a State court as to the law applicable to

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<sup>35</sup> 166 U. S. 226.

<sup>36</sup> The late Professor Henry Schofield, in an article entitled "The Supreme Court of the United States and the Enforcement of State Law by State Courts" in 3 *Illinois Law Review*, 195, has sought to show that, in these cases the Federal court held, in effect, and properly so, that an erroneous determination of State law by a State court can be treated as a denial of due process of law.

the matter in suit, upon the ground that to do so would permit the deprivation of property without due process of law. And, furthermore, this refusal was based on the principle that a litigant being entitled to the benefit of existing law governing his rights, a mere misinterpretation by a State court of what that law is, and which does not necessarily involve a denial of an essential procedural requirement of due process of law, is a denial of due process such as would support the revisionary power of the Supreme Court on writ of error.

In *Muhlker v. New York & Harlem R. Co.* <sup>36a</sup> there had been a complete reversal of ruling by the State court as to the legal right of the plaintiff to recover damages due to the creation of an elevated railway structure on the street upon which his property abutted. Upon error, the Supreme Court of the United States refused to follow the later decision of the State court as to the requirements of the State law. By a very forced construction the Supreme Court was able to hold that a contract right to indemnity had been violated by a State law. The court admitted, however, that the question of due process of law was involved, and it would seem that the decision might have been more satisfactorily disposed of upon this ground.

### § 1130. Rules of Evidence and Procedure May Be Changed.

It has been held that, so long as the fundamental rights of litigants to a fair trial, as regards notice, opportunity to present evidence, etc., and adequate relief are provided, and specific requirements of the Constitution are not violated, Congress has a full discretion as to the form of the trial or adjudication, and the character of the remedy to be furnished. Thus, the States not being bound by the Fifth, Sixth and Seventh Amendments, grand and petit juries may be dispensed with by them.<sup>37</sup> So also, within limits, legislatures may determine what evidence shall be received, and the effect of that evidence, so long as the fundamental rights of the parties are preserved.<sup>38</sup>

No person has a vested right to a particular remedy. "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."<sup>39</sup> Statutes of limitations, if reasonable, are not unconstitutional as denial of property or contractual rights. The authorities as to this are so numerous as not to need citation.

<sup>36a</sup> 197 U. S. 544; 25 Sup. Ct. Rep. 522; 49 L. ed. 872.

<sup>37</sup> *Hurtado v. California* (110 U. S. 516); *Maxwell v. Dow* (176 U. S. 581).

<sup>38</sup> See *Fong Yue Ting v. United States* (149 U. S. 698), and authorities there cited. In *Adams v. New York* (192 U. S. 585), it was held that due process of law was not denied by a State law making possession of policy/slips prima facie evidence of "possession thereof knowingly," and as such a crime.

<sup>39</sup> *Brown v. New Jersey* (175 U. S. 172).



**§ 1131. Presumptions.**

It is established that, without denying due process of law, certain facts or circumstances may be declared by statute to have a presumptive probative value, provided there is a reasonable logical relation between them and the facts they are declared to evidence. As the court said in *Mobile J. & K. C. R. Co. v. Turnipseed*,<sup>40</sup> "The law of evidence is full of presumptions either of law or of fact. . . . Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. . . . That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision, not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in the defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied to him."<sup>41</sup>

It is clear that, under this ruling, only in very clear cases can conclusive, as distinguished from *prima facie*, presumptions of fact, as distinguished from presumptions of law, be sustained. This doctrine is essentially involved in the refusal of courts to accept as conclusive facts found by administrative or other agencies without an opportunity for hearing given to the parties adversely affected by such determinations.

In *Hammond Packing Co. v. Arkansas*<sup>42</sup> it was held that due process of law was not denied by a State court striking from the files the answer of a foreign corporation and rendering a judgment by default against it, as permitted by State law, when the defendant disobeyed an order to secure the attendance as witnesses of certain of its officers and agents, and the production of papers and documents in their possession or control.

The case was distinguished from that of *Hovey v. Elliott*,<sup>43</sup> in which it had been held a denial of due process for a court, as a punishment for

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<sup>40</sup> 219 U. S. 35.

<sup>41</sup> See also *Lindsley v. National Carbonic Gas Co.* (220 U. S. 61).

<sup>42</sup> 212 U. S. 322.

<sup>43</sup> 167 U. S. 409.

contempt, based upon a refusal to obey an order of the court, to deny a right of the defendant to defend, and to give judgment without more ado to the plaintiff. The court said: "Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may, therefore, find its sanction in the undoubted right of the lawmaking power to create a presumption of the fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law. As pointed out by the court below, the law of the United States, as well as the laws of many of the States, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for."

### § 1132. Common-Law Remedies and Defences: Abrogation of.

Consistently with due process of law a State may provide by statute that the common-law doctrine of contributory negligence, and assumption of risk, and the fellow-servant doctrine shall not be applied so as to bar a recovery of damages for accidents to employees in hazardous occupations; and also that, in such causes, the burden of proof shall be upon the defendant to show that he has complied with all the requirements of law with regard to the safeguarding of dangerous machinery.<sup>44</sup>

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<sup>44</sup> See *Bowersock v. Smith* (March 6, 1917), and authorities therein cited. See also *Chicago, R. I. & P. R. Co. v. Cole* (251 U. S. 54).

**§ 1133. Unessential Statutory Formalities.**

The mere failure to comply with certain formalities prescribed by a State law is not, without reference to what those formalities are, a denial of due process. "When, then, a State court decides that a particular formality was or was not essential under a State statute, such decision presents no Federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the State interpretation of its own law is controlling and decisive."<sup>45</sup>

**§ 1134. State Systems of Judicial Administration Not Required to Be Ideal.**

The Federal requirement upon the State to furnish due process in the administration of its law does not obligate the States to provide a system of judicial administration that is ideal either in its organization or operation. It is sufficient if that system meets the fundamental conditions of justice and fairness. Thus, in *Ownbey v. Morgan*<sup>46</sup> the court, while observing that a liberal use of their summary and equitable jurisdiction by the courts of law so to control their own processes and proceedings as to avoid hardships to litigants is to be commended, yet such action was a matter of grace or discretion on their part, and, therefore, the refusal to exercise it could not be held to be a denial of due process of law. The court continued: "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains State action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. . . .

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the States to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to make amendments. Neither does it, as we think, require a State to relieve the hard-

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<sup>45</sup> *Castillo v. McConnico* (168 U. S. 674).

See also *French v. Taylor* (199 U. S. 274).

<sup>46</sup> 256 U. S. 94.

ship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

### § 1135. Arraignment.

In *Garland v. State of Washington* <sup>47</sup> the court refused to hold a conviction wanting in due process of law because the record showed that there had been no arraignment under, or plea to a second and amended information; it appearing that the accused had had a jury trial with full opportunity to be heard, in this respect overruling the earlier case of *Crain v. United States*.<sup>48</sup> The court in its opinion pointed out that technical objections, such as the one made in the instant case, were not given the weight which was formerly given to them, and said: "With improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away."

### § 1136. Jury Trial.

Indictment by a grand jury is not an essential of due process of law in criminal proceedings,<sup>49</sup> nor is trial by a jury.<sup>50</sup>

### § 1137. Self-Incrimination.

In *Twining v. New Jersey*,<sup>51</sup> the court, after an historical survey of the provision against self-incrimination, said: "We think it is manifest from this review of the origin, growth, extent, and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Charta or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision." While recognizing this historical argument as of great weight, the court, nevertheless, went on to rest its decision upon the broader ground, that, in its essential nature, the right is not one which necessarily inheres in the idea of due process. As to this the court said: "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutory as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The

<sup>47</sup> 232 U. S. 642.

<sup>48</sup> 162 U. S. 625.

<sup>49</sup> *Hurtado v. California* (110 U. S. 516).

<sup>50</sup> *Walker v. Souvinet* (92 U. S. 90); *Maxwell v. Dow* (176 U. S. 581).

<sup>51</sup> 211 U. S. 78.

wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it today, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient. See Wigmore, *Ev.*, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must, and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves.”<sup>52</sup>

### § 1138. Presence of Accused when Verdict Is Rendered May Be Waived.

In *Frank v. Mangum*<sup>53</sup> it was held that the requirement of due process is not violated by the absence of the accused when the verdict is rendered, if his presence has been waived by his counsel. Even when this waiver has been without his consent or knowledge, where the accused has failed to set this up in his motion for a new trial, after being fully aware of the waiver, and that motion has been heard both by the trial and the Supreme Court of the State, he cannot, after this motion had been adjudicated against him, move to set aside the verdict as a nullity because of his absence.<sup>54</sup>

### § 1139. Confronting Witnesses.

There is no case specifically holding that the opportunity to confront witnesses in criminal proceedings is a requirement of due process of law. In *West v. Louisiana*<sup>55</sup> it was held that such due process was not denied by the admission as evidence of the deposition of a witness, not present at the trial, which had been given at a preliminary examination at which the accused was present and given the opportunity to cross-examine.<sup>56</sup>

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<sup>52</sup> Justice Harlan dissented.

<sup>53</sup> 237 U. S. 309.

<sup>54</sup> See generally this case for a discussion of the extent to which the States, without denying due process of law, may modify common-law requirements with respect to jury trials.

<sup>55</sup> 194 U. S. 258.

<sup>56</sup> The court said: “We are of opinion that no federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party, or to fundamentally impair those general rights which are secured to him by the XIV Amendment. The accused has, as held by the state court in such case, been once confronted with the witness, and has had opportunity to cross-examine him, and it seems reasonable that when the State cannot procure the attendance of the witness at the trial, and he is a non-resident and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well as when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity.”

That opportunity to confront witnesses in criminal cases in the Federal courts shall be given the accused, is specifically provided by the Sixth Amendment.

#### § 1140. Appeal Not Essential to Due Process.

Due process of law does not require the provision of a right of appeal from a trial to a superior court. In *McKane v. Durston*<sup>57</sup> the court declared that "a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now a necessary element of due process of law."<sup>58</sup> In *Pittsburgh, etc., R. Co. v. Backus*,<sup>59</sup> with reference to a right of appeal in a matter of tax assessment, the court said: "If a single hearing is not due process, doubling it will not make it so."

#### § 1141. Due Process and Contempt Proceedings.

When a contempt has been committed in open court the court may, upon its own knowledge of the facts, without further proof, and without issue or trial or hearing of an explanation of the motives of the offender, immediately determine whether a punishment is justified and what that punishment shall be.<sup>60</sup> When, however, the contempt is not committed in open court, due process of law requires that the accused shall be advised of the charges, and be given a reasonable opportunity to meet them either by way of explanation or of defence.<sup>61</sup>

#### § 1142. Crimes Must Be Clearly Defined.

Due process of law requires that one shall not be held criminally responsible under statutes by which offences are so indefinitely defined or described as not to enable one to determine whether or not he is committing them. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."<sup>62</sup>

<sup>57</sup> 153 U. S. 684.

<sup>58</sup> This is quoted with approval in *Reetz v. Michigan* (188 U. S. 505); also in *Andrews v. Swartz* (156 U. S. 272); *Fallbrook v. Bradley* (164 U. S. 112).

<sup>59</sup> 154 U. S. 421.

<sup>60</sup> *Ex parte Terry* (128 U. S. 289).

<sup>61</sup> *Cooke v. United States* (267 U. S. 517).

<sup>62</sup> *Connally v. General Construction Co.* (269 U. S. 385). Citing *International Harvester Co. v. Kentucky* (234 U. S. 216); *Collins v. Kentucky* (234 U. S. 634). In the *Connally* case was held void, because of uncertainty, a State statute which provided an eight hour day for persons employed by or on behalf of the State and that they should be paid "not less than the current rate of per diem wages in the locality."

In *United States v. Cohen Grocery Co.* (255 U. S. 81), Section 4 of the Food Control Act of 1917 of Congress, was held similarly void which imposed a penalty upon any

In the footnote just given cases are referred to in which the provision of the Federal Anti-Trust Act of 1890 with reference to contracts or combinations in restraint of competition or the obstruction of interstate trade was upheld as not too vague for enforcement. In *Cline v. Frink Dairy Co.*<sup>63</sup> the whole subject of statutory uncertainty in its relation to due process of law was again reviewed, and it was pointed out that the principle has application to civil as well as to criminal legislation.<sup>64</sup> In this case a State anti-trust statute was held, by reason of its vagueness, to violate the requirements of due process of law, when, after denouncing conspiracies and combinations in restraint of trade, to increase prices, etc., it provided that no agreement or association should be deemed void (within the provisions of the act), the purposes of which might be to

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person who should make "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities."

In *United States v. Capitol Traction Co.* (34 App. D. C. 592), a statute was held void which made it an offence for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding."

In *Fox v. State of Washington* (236 U. S. 273), however, a State statute was held not to offend the principle of certainty which declared criminal the editing of printed matter tending to encourage and advocate disrespect for law. This decision, however, was reached, as the court said, in the light of applications of the statute made by the State court which indicated that the statute would be confined to the printed matter encouraging an actual breach of law. "Therefore," said the court, "the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail."

In *Nash v. United States* (229 U. S. 373), it was held that the provision of the Anti-Trust Act of 1890 with regard to contracts and combinations which unduly restrict competition or obstruct the course of trade was not so vague as to render it inoperative as a criminal measure, because it had been held that this provision applied only to such contracts or combinations as, by reason of intent or by their inherent nature, unduly restricted competition or unduly obstructed the course of trade.

Similarly, in *Seven Cases v. United States* (239 U. S. 510), was sustained as not too vague, the provision of the Food and Drugs Act of June 30, 1906 (34 Stat. at L. 768) which declares contraband of interstate trade drugs which bear or contain in or upon packages or labels false and fraudulent statements as to their curative or therapeutic value.

<sup>63</sup> 274 U. S. 445.

<sup>64</sup> Citing *A. B. Small Co. v. American Sugar Refining Co.* (267 U. S. 233). The court, however, in the instant cases said: "But the fact that it is often necessary to investigate and decide certain questions in civil cases is not controlling or persuasive as to whether persons may be held to civil or criminal liability for not deciding them rightly in advance. On questions of confiscatory rates for public utilities, for instance, courts must examine in great detail the circumstances and reach a conclusion as to a reasonable profit. But this does not justify in such a case holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect to what is a reasonable price or a reasonable profit. It is true that on an issue like negligence—i. e., a rule of conduct for the average man in avoiding injury to his neighbors—every one may be held to observe it either on the civil or criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist."

conduct operations at a reasonable profit, and, also, similarly excluded from the operation of the act, persons or corporations selling or manufacturing commodities of a similar nature who should form or own any interest in an association, firm or corporation having as its object the transportation or marketing of such commodities. "These provisos," said the court, "make the line between lawfulness and criminality to depend upon, first, what commodities need to be handled according to the trust methods condemned in the first part of the act to enable those engaged in dealing in them to secure a reasonable profit therefrom; second, to determine what generally would be a reasonable profit for such a business; and, third, what would be a reasonable profit for the defendant under the circumstances of his particular business. It would, therefore, be a complete defense for the defendant to prove in this case that it is impossible to sell milk or milk products, except by trust methods and make a reasonable profit, if he also showed that by such methods he had in fact only made a reasonable profit. . . . Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *Cohen Grocery* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this court refused to allow as a proper standard of criminality in *International Harvester Co. v. Kentucky*, 234 U. S. 216."

Distinguishing the instant case from that of *Nash v. United States*,<sup>65</sup> the court pointed out that, in the *Nash* case, the provision of the Federal Anti-Trust Act had been sustained because common-law precedents had rendered sufficiently certain and specific what constitutes an undue restraint of trade, and, in that respect, was distinguished from the case of *United States v. Cohen Grocery Co.*<sup>66</sup>

### § 1143. Excessive Penalties and Due Process of Law.

There is a line of cases which hold that due process of law is denied when such excessive penalties are attached to the violation of statutory

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<sup>65</sup> 229 U. S. 373. See preceding, footnote.

<sup>66</sup> 255 U. S. 581. See preceding, footnote.



or administrative orders as to make it practically impossible for the individual to test their validity by violating them. Thus, in *Missouri Pacific R. Co. v. Tucker*<sup>67</sup> the imposition by a State law of a liability of \$500 as liquidated damages, together with an attorney's fee, for every charge by a common carrier in excess of that fixed by law, was declared a denial of due process of law. "It will be perceived," said the court, "that this liability is not proportioned to the actual damages. . . . Nor is it as if there would be difficulty in proving or ascertaining actual damages."

*Ex parte Young*,<sup>68</sup> which falls within this line of cases, has been elsewhere discussed.<sup>69</sup>

In *Chicago, Milwaukee & St. P. R. Co. v. Polt*,<sup>70</sup> the exaction of a double penalty from a railway company failing to pay within sixty days claims for damages caused by fires set by a locomotive was held to deny due process of law. "The rudiments of fair play required by the Fourteenth Amendment," said the court, "are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. The case is covered by *St. Louis, I. M. & S. R. Co. v. Wynne*.<sup>71</sup> It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just."<sup>72</sup>

However, in *Kansas City Southern R. Co. v. Anderson*<sup>73</sup> a State law was upheld which provided for a double liability, and attorney's fees from railway companies which refused to pay for live stock killed by their trains within thirty days after the owner's demand, where the justice of the demand was fully established in suits following the refusal to pay. In this case the State courts had construed the act not to apply to cases where the original demands had been greater than that recovered upon trial.<sup>74</sup>

In *Southwestern Tel. & Tel. Co. v. Danaher*<sup>75</sup> the imposition upon the company of penalties aggregating \$6,300 because of its impartial enforcement against one of its patrons of a regulation that it would not furnish service to any patrons in arrears for past services, was a taking of the property of the company without due process of law.

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<sup>67</sup> 230 U. S. 340.

<sup>68</sup> 209 U. S. 123.

<sup>69</sup> See § 907.

<sup>70</sup> 232 U. S. 165.

<sup>71</sup> 224 U. S. 354.

<sup>72</sup> Citing *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* (226 U. S. 217).

<sup>73</sup> 233 U. S. 325.

<sup>74</sup> Cf. *Missouri, K. & T. R. Co. v. Cade* (233 U. S. 642); and *Missouri, K. & T. R. Co. v. Harris* (234 U. S. 412).

<sup>75</sup> 238 U. S. 482.

In *St. Louis, I. M. & S. R. Co. v. Williams*,<sup>76</sup> it was held that due process of law was not denied by a State law which subjected a common carrier to a penalty of not less than \$50 nor more than \$300 and costs for every offence of demanding or collecting a greater rate than that prescribed by law. Also the fact that the penalties were to go to the aggrieved passengers instead of to the State and were to be recoverable by a private suit, was held not a denial of due process of law. The court said: "When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable."

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<sup>76</sup> 251 U. S. 63.

## CHAPTER XCIII

### DUE PROCESS OF LAW AND ADMINISTRATIVE PROCEEDINGS

It has been earlier pointed out that due process of law does not require that personal and property rights shall, in all cases, be finally determined in courts of law as distinguished from administrative tribunals.<sup>1</sup> "Due process of law," means, then, not so much that a specific mode of procedure shall be followed, as that, in that procedure, certain fundamental principles looking to the protection of the individual against oppression and injustice shall be followed.

An administrative officer or board when acting in what is substantially a judicial capacity is not bound by the procedural requirements of a court of justice as regards evidence, pleading, etc. It may receive hearsay evidence and uncertified documents, dispense with the technical proof of their execution, etc. And, furthermore, it is not necessarily bound by the doctrine of *stare decisis*, although there is a general and quite proper tendency upon the part of *quasi-judicial* administrative tribunals to recognize this principle.

The extent to which, and the circumstances under which, a conclusive effect can be given by statute to the determinations of administrative tribunals with regard to questions of law and of fact are elsewhere discussed,<sup>2</sup> and what will be here said will be only supplementary to what is elsewhere said.

The processes employed by administrative tribunals differ from those in the courts, and, in some cases, are more summary, but they are all subject to the requirement that the essentials of due process of law shall not be denied,<sup>3</sup> and the courts assert the right, which cannot constitutionally be denied to them, to review all administrative determinations to an extent necessary to ascertain whether this has been done.

#### § 1144. Necessity for Notice and Hearing in Administrative Proceedings.

It has earlier appeared that it is fundamental to the idea of due process of law that an individual shall not have his legal rights finally determined without a notice that such rights are to be, or have been, examined and determined together with an opportunity to be heard, that is, to present such pertinent facts and arguments as he may desire in opposition to

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<sup>1</sup> *Murray v. Hoboken Land and Improvement Co.* (18 How. 272).

<sup>2</sup> See § 1094.

<sup>3</sup> *Yamataya v. Fisher* (189 U. S. 86).

action that may adversely affect him or his proprietary interests. In most cases it will be found that, as in judicial proceedings, it is necessary that this notice should be given, and opportunity for a hearing be provided before administrative action can be taken. But where, because of the urgency of public need, or for practical reasons of administrative efficiency or effectiveness, this prior notice and hearing is not feasible, it is held that the requirements of due process are satisfied if opportunity is later given to the individual adversely affected to test the validity or propriety of the administrative action on appeal to superior administrative authorities, or on appeal to the courts, or both. In not a few cases it is held that the requirements of due process of law are satisfied by the recognition of the right of the party to test the validity of administrative action in actions of tort for the recovery of damages against the administrative officials who have exceeded their legal authority to the injury of those bringing the action.<sup>4</sup> In the paragraphs which follow illustrations of these propositions are given.

#### § 1145. Nuisances: Abatement of.

"A nuisance . . . signifies in law such a use of property or such a course of conduct as, irrespective of actual trespass, against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom."

"A nuisance *per se* is an act, thing, omission, or use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances. . . . They usually, if not invariably, arise from personal misconduct, such as the commission of offenses against the public morals or decency; or from the physical invasion of public rights, as the unauthorized obstruction or unlawful use of navigable waters or other public highways; or from acts endangering the health or safety of human beings; or from acts constituting or tending to provoke breaches of the peace."

"An act or use of property to constitute a nuisance must violate some legal right either public or private, and must work some material annoyance, inconvenience, or injury, either actual or implied from the invasion of the right. The mere fact that it is unpleasant, annoying, or unsightly, will not be sufficient."<sup>4a</sup>

"Nuisances may be thus classified: First, those which in their nature are

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<sup>4</sup> For an excellent discussion of this general subject, see the articles by Professor T. R. Powell entitled "Administrative Exercise of the Police Power" in *24 Harvard Law Review*, 268, 333, 441.

<sup>4a</sup> *American and English Ency. of Law*, Article, "Nuisances."

nuisances *per se* or are so denounced by the common law or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.”<sup>5</sup> Nuisances are also distinguished as public and private. The distinction lies not in the nature of the thing itself, but in the nature of the rights affected by it. The same condition or act may thus constitute both a public and a private nuisance.

The aid of equity may be invoked for the abatement of nuisances whether public or private, or, in private nuisances, the individual may, at his own risk, himself undertake the abatement. In either case, whether by a process of court or by personal action, notice to the person responsible for the nuisance is not required where there is emergency. This constitutes an exception to the general principle that private property may not be taken or destroyed except after judicial proceedings and condemnation with notice to the owner.

A case which illustrates this requirement, but which stands rather upon the border line of what is permissible, is that of *Lawton v. Steele*.<sup>6</sup>

In this case, decided in 1894, the regulation involved had for its aim the protection of fishing in State waters, and provided that nets set in violation of the provisions of the act should be deemed a public nuisance and “abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid, and every game constable, to seize, remove, and forthwith destroy the same.” Here, as is evident, summary destruction of private property, without notice to the owner or judicial proceedings had, was authorized. The court, however, held that the nets thus illegally set might be held to be *per se* nuisances. “Where,” it was declared, “the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the paths of conflagrations; destruction of decayed fruit and fish and unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed.”

And, later, the court added: “It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate,

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<sup>5</sup> *Laugel v. City of Bushnell* (197 Ill. 20).

<sup>6</sup> 152 U. S. 133.

notice of the seizure given by publication, and regular proceedings to be instituted for its condemnation. . . . Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the act."

In this case some of the nets which were seized and destroyed were not in actual illegal use but were lying upon the shore. The usual rule would seem to be that articles capable of non-noxious use, and not in actual noxious use, may not be summarily destroyed, but, in this case, the destruction was justified by the court upon the ground that they were of comparatively little value. It was this holding which places the case upon the border line of constitutional propriety.

In *North American Cold Storage Co. v. Chicago*,<sup>7</sup> upon authority of *Lawton v. Steele*, a State law was upheld which provided for the summary seizure and destruction, without notice to the owner, of food in cold storage when unfit for human consumption. The court said: "If a party cannot get his hearing in advance of the seizure and destruction, he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property; and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness, as claimed by them."

Whatever may be said of this case, it would seem to the author that the court in *Lawton v. Steele*, approached the border of, if, indeed, it did not go beyond, the proper procedural limits of the police power. That an article which in itself constitutes a nuisance may be summarily destroyed is, of course, true, and this irrespective of the fact whether or not it is "of little value"; but certainly it is difficult to see upon what grounds of fact the nets could be held to be, in themselves, noxious. This was the position taken by the three justices who dissented, who, speaking through the mouth of Chief Justice Fuller, said: "The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without an opportunity to be heard. It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water, and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their re-

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<sup>7</sup> 208 U. S. 306.

moval, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use."

#### § 1146. Conclusiveness of Legislative Determination of Nuisances.

With reference, generally, to nuisances it may be said that it has never been recognized in this country that the legislature has a plenary, that is to say, an arbitrary, power to declare that to be a nuisance, which in actual fact is not necessarily such. Thus, in the early case of *Wynehamer v. People of New York*,<sup>8</sup> in which was involved the validity of a State law which not only forbade the selling of liquor but the keeping of it with intent to sell in any place whatever except in a dwelling house or in an industrial establishment where it was intended for technological use, and provided for its seizure and condemnation when so kept, the court while recognizing the full police power of the State to regulate the sale of liquor, or its manufacture, as to liquor in existence and possession prior to the enactment of the law, declared: "The portion of the law which authorizes the seizure and destruction of liquor where the prosecution or conviction of the owner is not contemplated, I do not hesitate to pronounce void, as property is thus destroyed or the citizen deprived of it without due process of law. It is not pretended, nor can it be, that property which is not *per se* a nuisance can be annihilated by force of a statute alone, or by proceedings *in rem* for the punishment of a personal offense. Liquor is not a nuisance *per se*, nor can it be made so by a simple legislative declaration. . . . It is in its use and abuse as a beverage which gives it its offensive character."

#### § 1147. Liquor Manufacturing and Selling as Nuisances.

The constitutional power of the State, or of the United States, to denominate as nuisances the manufacturing or selling of intoxicating liquors, and subject to abatement as such, has not been doubted since the decision in 1887 of *Mugler v. Kansas*.<sup>9</sup> In that case the court said: "The State having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender."<sup>10</sup>

<sup>8</sup> 13 N. Y. 378 (1856).

<sup>9</sup> 123 U. S. 623.

<sup>10</sup> By the Volstead Act of Congress of October 28, 1919 (41 Stat. at L. 305) it is provided (Sections 3 and 4) that premises where liquor is unlawfully sold shall be deemed public and common nuisances, and that suits in equity in the name of the United States to abate and enjoin them may be prosecuted. The jurisdiction of the Federal courts as

### § 1148. Other Phases of Nuisance Abatement.

Another phase of this subject was presented to the Supreme Court in *Baltimore and Potomac R. R. Co. v. Fifth Baptist Church*,<sup>11</sup> in which it was alleged by the defendant in error that the railroad had constructed an engine and repair shop the smoke from the chimneys of which constituted a nuisance. To the claim of the railroad that the authorization which had been granted to it by act of Congress to bring its tracks into the city and to construct such works as were necessary and expedient to its road, the court, after pointing out that the authority that had been granted by Congress could not be held to have authorized the construction and maintenance of works without reference to the property and rights of others, went on to say: "Undoubtedly, a railway over the public highways of the District, including the streets of the City of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But the case at bar is not of that nature. It is a case of the use by the Railroad Company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits, indeed, of grave doubt whether Congress could authorize the Company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the Company from the liability to suit for damages or compensation to which individuals acting without such authority would be subject under like circumstances. Without expressing

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to this is declared to be concurrent with that of the courts of the several States. The act also specifically provides for the issuance of injunctions to restrain defendants from conducting or permitting the continuance of such nuisances, and for punishment by contempt proceedings for violations of such injunctions. Under the authority thus given the so-called "padlocking" of premises by court orders has taken place. Specifically this "padlocking" is done under the provision of the Volstead Act which declares that "upon the judgment of the court ordering such nuisance to be abated, the court may order that the . . . place shall not be occupied or used for one year thereafter." The constitutionality of this provision, which permits an injunction preventing the use of premises for any purposes whatever, non-noxious as well as noxious, for a period of one year, though it has been sustained by a lower Federal court—*United States v. Eilert Brewing and Beverage Co.* (278 Fed. Rep. 659),—would seem to be highly doubtful. See the comments of Professor McBain in his *Prohibition Legal and Illegal*, pp. 112-116.

<sup>11</sup> 108 U. S. 317; 27 L. ed. 739.



any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places than those occupied could be used by the Corporation for its purposes, without causing such discomfort and annoyance.

"The acts that a Legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

#### § 1149. Liability of Officers Abating Nuisances.

It is established that the legislature may delegate to municipal or other administrative authorities the power to declare that certain things are nuisances and summarily to abate them as such, with or without notice or hearing. However, in those cases in which abatement is had without a previous determination by some due process of law that a nuisance in fact exists the officer acts at his peril. It is, however, in most cases a sufficient defence if the officer has acted in good faith and with reasonable grounds for believing—even though mistakenly—that a nuisance in fact existed. These principles are so well established that a citation of authorities is not needed. It is, however, to be noted that this question as to whether the officer had reasonable ground for believing that his action was justified, sometimes enables the jury to take an extreme view as to this, with the result that the officer is held liable in damages even when, to the ordinary mind, there appear to have been facts furnishing adequate reason for the officer to believe that he was justified in taking action. An instance of this was seen in the case of *Lowe v. Conroy*.<sup>12</sup>

There are some cases which hold that, when the administrative interference with personal liberty has been only temporary, or the interference with property of a minor character, the officer will not be held liable when acting in good faith and upon reasonable grounds, although it may later appear that the facts did not justify his action. Thus, in *Brown v. Purdy*,<sup>13</sup> the court said with reference to the removal of a person to a pest-house: "If there was any case for his judgment, or any fact of appearance or symptom as to which a question of small-pox or not could arise, his

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<sup>12</sup> 120 Wis. 151.

<sup>13</sup> 8 N. Y. St. Reporter, 143.

determination was final to as the legality or propriety of removal.”<sup>14</sup> In the opinion in the case of *Valentine v. Englewood Justice Swayze* gives a full argument in support of the doctrine stated and applied. The author, however, is of opinion that these cases are difficult to sustain on principle. This principle would seem to be that, only where there has been an opportunity for a hearing prior to action, can the conclusiveness of an administrative determination of fact be recognized.<sup>15</sup>

Where, from the nature of the case, the determination of the fact at issue, as, for example, the ascertainment of the character of a commodity, which character may be ascertained by comparing it with an established standard, it has been held that a hearing is not needed.<sup>16</sup> And in *Ekiu v. United States*,<sup>17</sup> earlier referred to, it will be remembered that it was held that the statute was held not to require inspectors to take testimony, and that they might decide upon their own inspection, whether an alien immigrant was entitled to enter the country; but that upon habeas corpus the question could be determined by the courts whether one prevented from landing had had an opportunity to ascertain whether his detention was lawful.

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<sup>14</sup> See also *Beeks v. Dickinson County* (131 Iowa, 244); and *Valentine v. Englewood* (76 N. J. 509).

<sup>15</sup> See 5 L. R. A. 635 note.

<sup>16</sup> *Public Clearing House v. Coyne* (194 U. S. 497).

<sup>17</sup> 142 U. S. 651.

## CHAPTER XCIV

### DUE PROCESS AND THE REGULATION OF PUBLIC UTILITIES AND OF INDUSTRIES AFFECTED WITH A PUBLIC INTEREST

In the chapter which follows the present one an examination will be made of what is termed the Police Power of States under which constitutional authority is provided for the governmental regulation of all private personal and proprietary rights in so far as this is determined to be reasonably necessary for guarding and subserving the interests of the public in matters of safety, health, morals, protection against fraud, and even public convenience.

Closely allied to this general police power, but distinct from it, is the constitutional authority recognized to be possessed by governments to regulate the charges made and the character of services to be rendered by private undertakings which are known as public utilities, or by services, and industries or occupations which are determined to be "affected with a public interest." With regard to these utilities, services, industries or occupations, it will be found that certain forms of regulation, and especially those regarding the charges which they may make for the services supplied by them, may be justified which cannot be constitutionally upheld as an exercise of police power. Thus it is that these public utilities, or services and industries or occupations affected with a public interest, while subject in common to the same police regulations to which all private employments are subject, are also, by reason of what is deemed to be their essential nature, subject to still further regulation without being entitled to assert that, by such regulation, they are denied due process of law in a substantive sense.

It has, therefore, been thought desirable to deal with this special subject before proceeding to a discussion of the police power which applies comprehensively to all private acts and to the use of all classes of private property.

#### § 1150. What Constitutes a Public Use.

A public use is one in which the interest of the public is directly and primarily concerned. It may happen, and, indeed, it very frequently happens, that, in the exercise of the State's powers, whether of eminent domain, taxation or police regulation, particular individuals or classes of individuals are benefited. If, however, the action is to be sustained, its aim must be shown to be not merely that this specific result will be reached

as a final end, but that the public has itself an interest in securing this benefit to the individuals concerned.<sup>1</sup>

A leading case upon this point is that of *Lowell v. Boston*,<sup>2</sup> decided in 1873. This was a proceeding to restrain the city of Boston from issuing certain bonds for the purpose of raising a fund to be loaned to individuals to aid them in rebuilding houses burned in the great fire of 1872. An injunction was granted upon the ground that for the payment of these bonds taxation would have to be resorted to, and that this could not be authorized for the reason that the purpose was not, essentially speaking, a public one. In its opinion the court said: "The promotion of the interests of individuals either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental." The court then went on to indicate as a test whether or not a contemplated improvement at State expense, is or is not a public one, the fact whether or not the public may use it, or otherwise derive a *direct* benefit from it, as, for example, when they use a highway. A public use, the court said, implies "a direct relation between the primary object of an appropriation to the public enjoyment. The circumstances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the commonwealth. The essential point is that it affects them as a community and not merely as individuals." In the case at bar the court went on to say: "The property thus created will remain exclusively private property to be devoted to private uses at the discretion of the owners of the land; with no restriction as to the character of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the commonwealth or to the city—except to repay the loan—or to the community or any part of it. If it be assumed that the private interests of the owners will lead them to reestablish warehouses, shops, manufactories and stores, and that the trade or business of the place will be enlarged by means of the facilities thus provided, still these are considerations of private interest, and, if expressly declared to be the aim and purpose of the act, they would not constitute a public object, in a legal sense."

In *Jones v. City of Portland*,<sup>3</sup> in which the court was called upon to

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<sup>1</sup> Though the principle governing the distinction between a public and a private use is the same for eminent domain as it is for taxation, Dr. Goodnow points out in his *Social Reform and the Constitution*, p. 318, that inasmuch as compensation is made when the former power is exercised and not when the latter is employed, the courts are apt to construe more strictly the requirement of a public purpose when taxation is involved, than when the right of eminent domain is concerned.

<sup>2</sup> 111 Mass. 454.

<sup>3</sup> 245 U. S. 217.

consider whether the maintenance by a city of permanent yards for the purpose of selling coal and wood at cost to its inhabitants was a public purpose for which taxes might be constitutionally levied, the court declared that while the ultimate authority to determine this and similar questions was in the court, it recognized that "local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information," and, therefore, that the judgments of the highest court of the State in specific instances should be held in high respect.<sup>4</sup> This being so, and the action of the municipality in the instant case having been held constitutional, the Supreme Court said that it would not reverse that holding. It said: "We see no reason why the State may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a State authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the State to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States."

### § 1151. State Pensions: Have They a Public Purpose?

The constitutionality of schemes for the payment of pensions out of public funds to individuals whether on account of accidents, sickness, old age, or unemployment, raises questions somewhat different from those we have thus far been considering. A very satisfactory discussion of this subject is given in Chapter VII of Dr. F. J. Goodnow's *Social Reform and the Constitution*, and not a little of the discussion here given upon this point is based upon his study.<sup>5</sup>

Since early times both in England and the United States, public aid to the indigent has been deemed a legitimate function of the State, and with no serious objection as to its constitutionality. Thus whatever constitutional objection might have been originally raised upon the ground that public funds are thus appropriated for private purposes, is now rendered futile by the historical doctrine stated in *Loan Association v. Topeka*,<sup>6</sup> that the courts, in determining whether or not a purpose is a public one, for which taxes may be levied "must be governed mainly by the course and usage of the government, the objects for which taxes have been

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<sup>4</sup> Citing *Hairston v. Danville & Western R. Co.* (208 U. S. 598); *Union Lime Co. v. Chicago N. W. R. Co.* (233 U. S. 211).

<sup>5</sup> See also Freund's *The Police Power*, pp. 459-464.

<sup>6</sup> 20 Wall. 655.

customarily and by a long course of legislation levied." There is, however, abundant though not unanimous authority in support of the view that appropriations in aid of the poor must be limited to those who are in institutions which are under public control and management.<sup>7</sup>

If State appropriations in aid of outdoor indigency are, in general, invalid, *a fortiori* is this the case when the proposed expenditure is simply for the prevention of possible poverty. Dr. Goodnow, as a result of his search of the authorities, declares that the only State case which he has found which shows a tendency to uphold the use of the taxing power for the *prevention* of poverty is that of *North Dakota v. Nelson Co.*,<sup>8</sup> in which the court takes the position that if poverty itself may be relieved by the State, it may grant aid whenever there is reasonable ground for holding that, without it, the individuals to be benefited will become paupers and charges upon the State or counties. We may, then, despite this case, accept Dr. Goodnow's opinion that "until State constitutions have been changed and the State courts have decided that such changes are, from the viewpoint of the Federal Constitution, proper, there is no great likelihood that a system of State pensions in the case of old age, sickness, or accident which is based even on the indigency of the recipients of such pensions would be regarded as constitutional."

### § 1152. Federal Pensions: Have They a Public Purpose?

As regards the power of the Federal Government in the premises, the matter is not so certain. Many appropriations have been made by Congress in the form of pure gratuities, the validity of which has never been contested in the courts.<sup>9</sup> In *United States v. Realty Co.*<sup>10</sup> an appropriation by Congress in payment of certain claims against the United States which were equitable merely, was contested but held valid, the court saying: "Congress has power to levy and collect taxes, etc., to 'pay the debts' of the United States . . . the term 'debts' includes those debts which rest upon a merely equitable or honorary obligation, and which could not be recoverable in a court of law if existing against an individual. . . . Payments to individuals . . . in the nature of gratuity, yet having some features of moral obligation to support them,

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<sup>7</sup> Dr. Goodnow refers to *Lucas v. State* (75 Ohio, 114); *Wisconsin Keeley Institute Co. v. Milwaukee* (95 Wis. 153); and *contra Mayor v. Keeley Institute* (81 Md. 106); *In re House*, 46 Pac. (Col.) 117; and *White v. Inebriates' Home* (141 N. Y. 123).

<sup>8</sup> 1 N. D. 88.

<sup>9</sup> See the speech of Senator Daniel in Cong. Rec. XXI, pt. 3, p. 2295, in which he enumerates some forty instances of such appropriations. See also the article entitled "Massachusetts as a Philanthropic Robber" in the *Harvard Law Review*, XII, 316, in which the author enumerates the many instances in which the State has appropriated sums to individuals in the form of pensions, indemnities, gratuities, etc.

<sup>10</sup> 163 U. S. 427.

have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. . . . In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must, in its nature, be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment, can rarely, if ever, be the subject of review by the judicial branch of the government." It is seen that the court refers to the fact that Congress has often appropriated money upon considerations of pure charity. No constitutional objection is raised by the court to this, but the case itself is, of course, only authority for the doctrine that appropriations may be made by Congress in payment of claims against the United States which are equitable merely.

As will be observed, the court intimates that it is not often that the question as to the validity of an appropriation can be raised in such a way as to require the courts to pass upon it. Thus in *Wilson v. Shaw*,<sup>11</sup> a taxpayer having sought to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of a canal at Panama, or borrowing money for that purpose, the court, while not deciding the case squarely upon the point that the petitioner had no *locus standi*, nevertheless said: "For the courts to interfere, and, at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the Treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary."

The doctrine here stated with reference to the appropriating powers of Congress would seem, then, to be much more liberal than is the doctrine in the States with reference both to the purpose for which public money may be expended, and to the refusal, upon the suits of taxpayers, to give injunctive relief. The States have frequently made appropriations for purely private purposes which have not been questioned in the courts;<sup>12</sup> but, when judicially questioned, the courts have frequently decided that the proposed expenditures were for private purposes and therefore invalid.

### § 1153. Military and Civil Pensions.

In a great number of cases the Federal courts have construed and applied without constitutional objection the laws of the United States providing pensions to soldiers and sailors, notwithstanding the fact that these pen-

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<sup>11</sup> 204 U. S. 24.

<sup>12</sup> For further discussion of the appropriating power of Congress, see *ante* § 62.

sions have been held to be gratuities.<sup>13</sup> However, as Dr. Goodnow observes, not a great deal can be predicated upon these cases for the reason that military pensions are made upon the theory that their recipients are persons having a peculiar moral claim upon the government which they have served, and are thus brought within the doctrine of the Bounty case.

As regards pensions paid by the States to their employees, the doctrine seems to be that when the circumstances are such as to enable the courts to view the payments as a form of compensation for public services, they are valid. Where this is not the case, they have generally been held invalid as, for example, in the case of *Beach v. Bradstreet*<sup>14</sup> in which the court held void a law providing for the payment of a pension to "every resident Civil War veteran honorably discharged."

#### § 1154. Pension Systems Based on Funds Created by Enforced Contributions from Special Classes.

The case of *Noble State Bank v. Haskell*<sup>15</sup> is not a possible authority for a system of pensions to injured employees, unless the fund is composed wholly of contributions by the employees. If it is established that the employers may be compelled to insure their employees against sickness or accident, they may be compelled to create the fund wholly by their contributions, or the employees could be called upon to contribute in part.

But the *Bank Guarantee* case would not be authority for a pension fund created wholly by contributions of the employees themselves, unless the courts are willing to hold that there is a solidarity of interest not only between the employees *inter se*, but between them and the public sufficient to justify the law upon the grounds of public interest. As we have seen, there is not sufficient authority to justify it as a method of preventing poverty.

If, however, the pensions are limited to those injured by reason of dangers inherent in the enterprise in which they are engaged, the employers might possibly be required to establish a fund for the purpose.

There are a number of cases in which it has been held constitutional to tax all owners of dogs in order to raise a fund from which owners of sheep killed by dogs may be reimbursed.<sup>16</sup>

In *State v. Cassidy*<sup>17</sup> it was held that vendors of intoxicating liquors might be required to pay a fixed sum per annum into the public treasury, in addition to their regular license fees, in order to obtain a fund, to be distributed by the State, for the establishment and maintenance of asylums for the care and cure of inebriates.

<sup>13</sup> *Walton v. Cotton* (19 How. 355); *United States v. Teller* (107 U. S. 621).

<sup>14</sup> 82 Atl. (Conn.) 1030.

<sup>15</sup> 219 U. S. 104.

<sup>16</sup> *Van Horn v. People* (46 Mich. 183). Cf. 17 L. R. A. (N. S.) 855.

<sup>17</sup> 22 Minn. 312.



The constitutionality of assessments upon employers and employees for the creation of funds for insuring workmen against accidents, old age and invalidity will receive later specific discussion.<sup>18</sup>

### § 1155. Due Process and the Regulation of Public Industries or Occupations.

There are a considerable number of industries or occupations which, though privately owned and operated, are considered as essentially public in character and as such subject to public regulation as to the manner in which they shall be conducted, the services which they shall render or perform, and the charges which they may make for such services. In most, if not in all cases, these industries or occupations are ones which require and enjoy special privileges granted by the State, as, for example, the use of public property, or the right to exercise the power of eminent domain. In earlier days these so-called public employments included such trades as surgery, tailoring, smelting, baking and milling, as well as of the innkeeper, carrier, ferryman and wharfinger.<sup>19</sup> At present, however, the distinctively public occupations are limited to those which avow the purpose to serve, not a select clientele, but the public generally, and which are, because of the part they play in the social and industrial economy of the people, essentially public in character. "But whether there has been profession enough in a particular instance and whether the business is sufficiently public in its general character is, in each instance in last analysis, a question of fact, although rules of law may aid in dealing with those facts. And, since this is a question of fact rather than of law in most cases, the discussion of it requires the statement of many cases involving many close issues of fact. For although the public profession is often enough made in express terms, it is also not infrequently left to implication from the general course of the business in question."<sup>20</sup>

The criteria for determining the public character of an occupation or industry, as well as the extent and modes of State regulation that may be constitutionally predicated upon such a character, will appear in the sections which follow in which is considered the relation of due process of law to occupations or industry which though not, essentially speaking, public in character, are, for all practical purposes, brought within the class of public employments by being regarded as "affected with a public interest."

In general it is to be said that the question whether an industry or occupation is of a public character or is affected with a public interest is of significance to due process of law only upon its substantive side, for, pro-

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<sup>18</sup> See Chapter XCVIII.

<sup>19</sup> See Wyman, *Public Service Corporations*, Chapter I.

<sup>20</sup> Wyman, *op. cit.* 200.

cedurally considered, the requirements of due process of law operate as fully with respect to such industries or occupations as it does to other private industries or occupations.

### § 1156. Right of Public Utilities to Cease Operation.

Some early cases contain the dictum that public service corporations may be compelled to continue operations even though at a continuing loss to their stockholders. In more recent cases, however, the Supreme Court has held that such compulsion would be a taking of property without due process of law. This was declared, for instance, in *Brooks-Scanton Co. v. Railroad Commission*.<sup>21</sup> However, in that case, the court continued: "It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfil an obligation imposed upon it by the charter even though fulfilment in that particular may cause a loss."<sup>22</sup>

In *Bullock v. Florida* <sup>23</sup> the doctrine of the *Brooks-Scanton* case was reaffirmed, the court saying: "Apart from statute or express contract, people who have put their money into this railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. . . . No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State, and have been allowed to exercise the power of eminent domain."<sup>24</sup>

In *Brooks-Scanton Co. v. Railroad Commission* <sup>25</sup> it was declared that a carrier could not be compelled to carry on even a branch of its business at a loss. However, it would appear that this doctrine does not necessarily apply to branch lines of railways or to other parts of an entire system unless the loss on such branches or parts is sufficient to cause the whole business to be conducted at a loss. In other words, if a service as a whole is not forced to operate at a loss the company may be compelled to continue service on particular branches thereof, even though there is a loss upon those branches separately and independently considered.<sup>26</sup>

In *Fort Smith Light & Traction Co. v. Bourland* <sup>27</sup> it was held that a street railway company was not denied due process of law by the refusal by the proper authorities to permit the company to abandon a small sec-

<sup>21</sup> 251 U. S. 396. Citing *Northern Pac. R. Co. v. North Dakota* (236 U. S. 585); and *Norfolk & W. R. Co. v. W. Va.* (236 U. S. 605).

<sup>22</sup> Citing *Missouri Pac. R. Co. v. Kansas* (216 U. S. 262).

<sup>23</sup> 254 U. S. 513.

<sup>24</sup> This doctrine is again affirmed in *Railroad Com. v. Eastern Texas R. Co.* (264 U. S. 79).

<sup>25</sup> 251 U. S. 396.

<sup>26</sup> *Iowa v. Old Colony Trust Co.* (215 Fed. Rep. 307). See generally the excellent paper of Professor Oliver P. Field, "The Withdrawal from Service of Public Utilities Companies," in 35 *Yale Law Journal*, 169.

<sup>27</sup> 267 U. S. 330.

tion of its track, although operated at a loss, and although, due to a change in the grade of the street upon which it ran, the line would have to be rebuilt at a great expense, and, furthermore, in face of the fact that it was shown that the whole railway system of the company was not yielding a fair market return on the value of the investment involved. The court, in the course of a very short opinion, said: "We cannot say that it [the order of refusal] is inherently arbitrary. A public utility cannot, because of loss, escape obligations voluntarily assumed."<sup>28</sup> The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss.<sup>29</sup> This is true even where the system as a whole fails to earn a fair return upon the value of the property. So far as appears, this company is at liberty to surrender its franchise and discontinue operations throughout the system. It cannot in the absence of a contract be compelled to continue to operate its system at a loss."<sup>30</sup>

Public service corporations have, in cases of strikes, been required to continue to furnish service to the public, at whatever cost to themselves, by way of increased wages to their employees, or otherwise. They are, however, of course, entitled to demand for themselves, in such cases, adequate police protection.

A carrier may not excuse himself for failure to transport upon the ground that he has not sufficient equipment, for it is his absolute duty to be adequately provided. In *People v. New York Central R. R. Company*,<sup>31</sup> decided in 1885, the company having attempted to excuse its failure to provide service upon the ground of a strike, the court said: "The most that can be found from the petition and affidavits is that the skilled freight-handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for mandamus. These facts reduce the question to this: can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of

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<sup>28</sup> Citing *Milwaukee El. R. & Light Co. v. Wisconsin* (252 U. S. 100).

<sup>29</sup> Citing *Missouri P. R. Co. v. Kansas* (216 U. S. 262); *Chesapeake & O. R. Co. v. Public Service Com.* (242 U. S. 603); *Railroad Com. v. Eastern Texas R. Co.* (264 U. S. 79).

<sup>30</sup> Citing *Brooks-Seanton v. Railroad Com.* (251 U. S. 396).

<sup>31</sup> 28 Hun, 543.

but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential and imperative and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to mandamus or indictment." <sup>32</sup>

#### § 1157. Due Process of Law and Industries Affected with a Public Interest.

The Supreme Court, by the decision which it rendered in *Munn v. Illinois*,<sup>33</sup> introduced into American constitutional jurisprudence the doctrine that an industry or occupation, not in itself public in nature, may become such in fact and substantially in law by the reason of the position of importance and indispensableness it comes to occupy in the economic and industrial life of the people; in other words, that it thereby becomes "affected with a public interest" and subject to the same power and modes of state regulation as are allowable in cases of industries essentially public in nature.

That this doctrine opens a possible way to an indefinite extension of the State's regulative powers is at once apparent. In the *Munn* case it was applied to grain elevators, a State regulation fixing maximum rates for the storing and handling of grain being upheld. Here there were present two elements, either of which might have been accepted as a criterion for determining the inclusion of the elevators within the class of public employments. These were: first, that these warehouses were so intimately connected with the system of public carriers that they might be considered as integral parts of them; and, second, that they constituted a virtual monopoly, and, as such, being removed from the effective regulation of free competition, required public regulation. Both of these elements were dwelt upon by the court in its majority opinion, but neither made the controlling factor in the decision. Indeed, as has already been said, the general doctrine was declared that "property does become clothed with a public interest when used in a manner to make it of public consequence, and to effect the community at large." "When, therefore," the court continued, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the general good, to the extent of the interest he has thus created."<sup>34</sup> After pointing out that the elevators or

<sup>32</sup> Cf. Beale & Wyman, *Railroad Rate Regulation*, Sec. 273.

<sup>33</sup> 94 U. S. 113.

<sup>34</sup> Wyman contends that the doctrine should be declared, if, indeed, it has not already

warehouses possessed and exercised a virtual monopoly, the court said: "Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman possesses a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use the language of their counsel, in the very 'gateway of commerce, and take toll from all who pass.' Their business most certainly 'tends to a common charge and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll which is a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation,' viz., that he . . . 'take but a reasonable toll.' Certainly if any business can be clothed 'with a public interest and cease to be *juris privati* only' this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts."

Two justices, Field and Strong, dissented in the *Munn* case, the former preparing the dissenting opinion, in which public employments were limited to those in which property is "dedicated by the owner to a public use, or to property the use of which was granted by the government, or in connection with which special privileges were conferred." If the doctrine of the majority be sound law, Field declared, "all property and all business in the State are held at the mercy of a majority of its legislature." And he continued: "The doctrine of the State court, that no one is deprived of property, within the meaning of the inhibition of the Constitution, so long as he retains its title and possession, and the doctrine of the court that, whenever one's property is used in such a manner as to affect the community at large it becomes, by that fact, clothed with a public interest, and ceases to be *juris privati* only, appear to me to destroy for all useful purposes, the efficacy of the constitutional guaranty." Justice Field then went on to show that there was nothing in the character of the business of the plaintiff in error which would justify an exercise by the State of its police powers.

#### § 1158. Power to Regulate Public Services and the Police Power Distinguished.

The constitutional authority of the State to regulate public services and the use of property affected with a public interest is often spoken of as embraced within the meaning of the so-called police power. As will later appear in this treatise, the term police power may be given and, indeed,

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been established, that where there is virtual monopoly in fact, a public interest justifying public control, *ipso facto*, exists. See his *Public Service Corporations*, and his *Control of the Market*. The same view is expressed in Beale & Wyman's *Law of Railroad Regulation*, 32.

originally had a signification broad enough to include within its scope all of the general regulative powers of the State and thus to embrace the specific power over public employments and those affected with a public interest. According to the writer's judgment it is, however, better to give a more restricted and more definite connotation to the term police power according to which the constitutional right of the State to regulate industries or undertakings affected with a public interest is not embraced within it. The police power, as a distinct branch of public authority existing under our system of constitutional jurisprudence, will be presently considered.

In the Sinking Fund cases,<sup>35</sup> Justice Bradley, one of the concurring justices in the Munn case, said of that case: "We held that when an employment or business becomes a matter of such public interest as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community,—it is subject to regulation by the legislative power." This was said by Justice Bradley in a dissenting opinion, but is quoted with approval by the court in *Budd v. New York*.<sup>36</sup> In *People v. Budd* <sup>37</sup> the New York Court of Appeals applied the doctrine of the Munn case to a substantially similar statute, and this doctrine was affirmed by the Federal Supreme Court,<sup>38</sup> the court saying: "We must regard the principle maintained in *Munn v. Illinois* as fairly established."

In the dissent of Justice Brewer, concurred in by Justices Field and Brown, it appears to be assumed that the fact of monopoly has been held by the majority as controlling and the argument is made that where the monopoly is merely one of fact, and not of law, there is no necessity nor justification for legislative interference. "If there be a monopoly, it is one of fact and not of law, and one which any individual can break."

In *Brass v. Stoesser* <sup>39</sup> the doctrine of the Munn case was again applied in sustaining a law regulating grain warehouses and the weighing and handling of grain. Here, however, four justices dissented.<sup>40</sup> In this case, as these justices pointed out, the defendant was compelled by the mandate of the court to engage in a business he had not intended and had not desired to enter into. As they said: "It appears . . . that the principal business of defendant was that of buying wheat and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained his elevator for the exclusive purpose of purchasing grain to fill his contracts, and while at the time the elevator was not full and there was room for the

<sup>35</sup> 99 U. S. 700.

<sup>36</sup> 143 U. S. 517.

<sup>37</sup> 117 N. Y. 1.

<sup>38</sup> *Budd v. New York* (143 U. S. 517).

<sup>39</sup> 153 U. S. 391; also frequently cited as *Brass v. North Dakota*.

<sup>40</sup> *Brewer, Field, Jackson and White*.

storage of the grain tendered by the petitioner, and the defendant had at times used vacant space in his elevator for the storage of grain of others, yet such use was a mere incident and subordinate to his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator." By the law in question, however, he was compelled to receive grain, when tendered, so long as he had the storage capacity unoccupied in his elevator, even though his principal business might thereby be injured or destroyed. It is furthermore to be observed that in this case the law also compelled the owner of the warehouse to insure and pay the cost of insuring the grain tendered to him for storage. As to this requirement Justice Brewer said: "I can only say that it seems to me that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost."

### § 1159. Monopoly as a Test of Public Character.

This case of *Brass v. Stoesser* is significant not only for the special features of the law which have already been mentioned as having been dwelt upon by the dissenting justices, but because it clearly repudiated the idea that virtual or actual monopoly is the test for determining when a business has ceased to be *juris privati* only, and has become subject to public regulation. For here the law which was sustained was not limited in its application to large ports of export, and there was shown no monopoly or monopolistic tendency in the business of grain elevating in North Dakota. This point was pressed upon the court, but the court said: "When it is once admitted here that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such powers may legally be exerted over the same business when carried on in smaller cities and in other circumstances."<sup>41</sup> Here it is clear that the nature of the occupation is held to be decisive, that is, irrespective of the fact whether the monopoly is, or is not, present.

### § 1160. Distinction between Public Services and Industries Affected with a Public Interest as Regards Regulation.

The foregoing discussion has proceeded upon the theory that a private industry or occupation, when affected with a public interest, is subject to the same regulation as one that is *per se* public in character. It would appear, however, that while, generally speaking, this is true, it has been claimed not to be so in one respect. This alleged difference is in the fact that while, with reference to occupations private in character but affected with a public

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<sup>41</sup> The fact that no monopoly was shown was made one of the grounds of dissent in the dissenting opinion.

interest, the regulation of law may not go so far as to prevent those who are engaged in them from obtaining a reasonable return for their services and their property as invested, this may not always be required of the law with reference to occupations *per se* public in character. As to these it has been claimed that the public interests are always to receive consideration and, therefore, if an investment has been improvidently made by a company, as, for example, the provision of greater facilities for transportation than the conditions require, or, if originally made with good judgment, events have happened which make the investment no longer a reasonable one without charging very high rates, as, for example, might occur with reference to a railroad which after being several years in operation should be subjected to other competition, or to a parallel line of road better located,—in such cases an excessive rate may not, as a constitutional right, be imposed simply in order that there shall be a return above operating expenses sufficient to represent an ordinary profit upon the property invested. This principle was illustrated by observations made by the court in the case of *Cotting v. Godard*.<sup>42</sup> In this case prior decisions with reference to the criteria for determining the reasonableness of a public service rate reviewed; and, after adverting to facts in the case, the court said: "Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself. In the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be

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<sup>42</sup> 183 U. S. 79. Sometimes also cited as *Cotting v. Kansas City Stockyards*.



urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?

"Again, wherever a purely public use is contemplated, the State may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain, by which property can be taken, and taken, not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and, exercising those powers and doing the work of the State, is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.

"In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all State regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business."

It is to be observed that the foregoing observations were *obiter* in character. They have been quoted as suggesting possible constitutional conclusions. In fact, however, it does not appear that the court, in later decisions has been influenced by the distinction that had been pointed out.

### § 1161. Insurance Affected with a Public Interest.

In *German Alliance Insurance Co. v. Lewis* <sup>43</sup> it was held that the business of writing fire insurance is affected with a public interest so as to permit its rates and charges to be regulated by the State. This holding involved the declaration of the doctrine that a business may be or become affected with a public interest even though no public trust is imposed upon it and the public have not a legal right to demand and receive service from it. In the course of an elaborate opinion, the court, while admitting that, in some degree, the public is interested in every private business transaction, went on to say that, in order to be subject to governmental regulation as to its charges and rates, there must be a more special public interest. This more special public interest it had been established by the earlier cases (which the court reviewed) was a fact, the court said, which was to be determined, not according to any inflexible or technical rule, but according to general considerations of public requirement. As regards fire insurance, the court pointed out that very generally it had been deemed by the States a business that required more or less special police and other regulation. "A conception so general," said the court, "cannot be without a cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. . . . It may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it. . . . Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individual." And, later: "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. . . . The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly." <sup>44</sup>

The court appreciated, as of course it could not escape from doing, that the principles applied in the instant case could possibly be so applied as to open up to regulation so many other private undertakings or transactions as, in effect, to abolish, for all practical purposes, the distinction between such private businesses as are subject to government regulations and those which are not. In order to avoid, so far as might be, this possible result of its decision, the court could only say: "The principle we apply is definite

<sup>43</sup> 233 U. S. 389.

<sup>44</sup> Earlier in the opinion it had been pointed out that, as a matter of common knowledge, insurance rates are not fixed for each individual person or property insured, but are imposed according to prearranged schedules and classifications of property.

and old, and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of insurance, it having become 'clothed with a public interest,' and therefore 'to be controlled by the public for the common good.'" It scarcely needs be pointed out that this explanation serves to erect no serious barrier to the further application of the *ratio decidendi* of the decision, and that the decision must be regarded as marking an important stage in the development of the right of the State, according to American constitutional jurisprudence, to subject private undertakings or transactions to public regulation.<sup>45</sup>

**§ 1162. Places of Amusement or Entertainment Not Public Utilities Affected with a Public Interest.**

In *Tyson and Bro. v. Banton* <sup>46</sup> the court had under consideration as to its constitutionality a law of the State of New York which forbade the re-selling of tickets to any theatre "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry." The court refused to sustain this provision as a proper police measure,<sup>47</sup> or as a proper measure for the regulation of a business affected with a public interest.

It would seem that the court might have considered that the business the nature of which was to be examined was that of theatre ticket brokers, but, instead, it treated the case as one involving the essential nature of the business of supplying amusement or entertainment to the public. This business, it declared, was not affected with a public interest, and, therefore, that the rates at which tickets of entry might be sold, could not constitutionally be fixed or limited by the State. The court said: "A theatre is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stock yards, standing in like relation to the commerce in live stock; or an insurance company, engaged, as a sort of common agency, in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect to their interests in the fund. Sales of theatre tickets bear no relation to the commerce of the country; and they are not interdependent transactions, but stand, both in form and effect, separate and apart

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<sup>45</sup> Chief Justice White and Justices Lamar and Van Devanter dissented, Justice Lamar filing a long and strong dissenting opinion, in which the possible and logical extension in application of the doctrine of the majority was emphasized.

<sup>46</sup> 273 U. S. 418.

<sup>47</sup> As to this see Chapter XCV.

from each other, "terminating in their effect with the instances." And, certainly a place of entertainment is in no legal sense a public utility; and, quite as certainly, its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency."

### § 1163. Employment Agencies Not Affected with a Public Interest.

In *Ribnik v. McBride*<sup>48</sup> the court held that while a State has the power to require a license of, and in other ways to regulate, employment agents for police purposes, their business is not affected with a public interest so as to justify the State in fixing the charges they may make for the services rendered by them. The court said: "The business of securing employment for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, or ticket broker. . . . An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants."

### § 1164. Oil Pipe Lines.

The case of *United States v. Ohio Oil Co.*<sup>49</sup> has been earlier considered in its bearing upon interstate commerce.<sup>50</sup> It needs to be here again referred to as holding not merely that the transportation of oil by means of pipe lines is a public utility, and, therefore, subject to public regulation as to its rates, charges, etc., but that a private pipe line company which transports only its own oil, and receives oil from other companies for transportation only upon condition that the oil shall first be sold to itself, is to be considered as a "public carrier" within the meaning of that term as employed in the Interstate Act of 1887 as amended by the act of June 29, 1906.<sup>51</sup> A company transporting only oil produced by itself, and not bought from other companies, was held not to be within the purview of the act.<sup>52</sup>

<sup>48</sup> Decided May 28, 1928.

<sup>49</sup> 234 U. S. 548.

<sup>50</sup> See *ante*, § 594.

<sup>51</sup> 34 Stat. at L. 584. This case, and other cases decided in connection with it are generally known as "The Pipe Line Cases" and are so styled in the official reports of the Supreme Court.

<sup>52</sup> In *State Public Utilities Com. v. Bethany Mutual Telephone Assn.* (270 Ill. 183) it was held by a State court that an association for the construction and operation of a telephone line for supplying service only between the members of the Association was not a public utility within the meaning of the State Public Utilities Law.

**§ 1165. Further Discussion of Criteria for Determining Occupations to be Affected with a Public Interest.**

In *Wolff Packing Co. v. Court of Industrial Relations*<sup>53</sup> was involved the constitutionality of a State law which, *inter alia*, vested in a State-established Industrial Court authority, in certain cases, to fix wages and other terms of employment in establishments for the manufacture and preparation of food for human consumption or of clothing for human wear, for the production of fuel and for its transportation. This statutory provision the court held unconstitutional as being beyond the police power and being an attempt to fix wages in employments essentially private in nature. In order to reach this conclusion, the court entered into a careful inquiry as to the criteria for distinguishing those occupations or industries which are affected with a public interest and those which are not, and attempted the following summing up, and classification of kinds of business which may properly be said to be affected with a public interest: "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills.<sup>54</sup> (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."<sup>55</sup>

It is to be noted in the foregoing that in the third class of businesses affected with a public interest no attempt is made to cite illustrations; and that, as to the second class, the essential element justifying legislative regulation is purely an historical one, and not a special characteristic of the business included.

It requires no especial acuteness of mind to see that, in truth, no clear

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<sup>53</sup> 262 U. S. 522.

<sup>54</sup> Citing *State v. Edwards* (86 Me. 102); *Terminal Taxicab Co. v. Kutz* (241 U. S. 252).

<sup>55</sup> Citing *Munn v. Illinois* (94 U. S. 113); *Spring Valley Waterworks v. Schottler* (110 U. S. 347); *People v. Budd* (117 N. Y. 1); *Brass v. North Dakota* (153 U. S. 391); *Noble State Bank v. Haskell* (219 U. S. 104); *German Alliance Ins. Co. v. Lewis* (233 U. S. 389); *Van Dyke v. Greary* (244 U. S. 39); *Block v. Hirsh* (256 U. S. 135).

line of distinction can be drawn between those industries or employments which may be said to be affected with a public interest and those which may not be so characterized. In no other way will it be possible to show more clearly the vagueness of the line which separates those private businesses which are subject to government regulation on the ground that they are affected with a public interest, and those which are not constitutionally subject to such regulation, than to quote from the majority and minority opinions of Justices Holmes and Stone in the recent case of *Tyson & Bro. United Theatre Ticket Offices v. Barton*<sup>56</sup> decided in 1927.

In this case the majority of the court declared: "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease, or enjoyment from the existence or operation of the business; and, while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood." And, later: "If it be within the legitimate authority of government to fix maximum charges for admission to theaters, lectures (where perhaps the lecturer alone is concerned), baseball, football, and other games of all degrees of interest, circuses, shows (big and little), and every possible form of amusement, including the lowly merry-go-round with its adjunct, the hurdy-gurdy (*Commonwealth v. Bow*, 177 Mass. 347, 58 N. E. 1017), it is hard to see where the limit of power in respect of price fixing is to be drawn."<sup>57</sup>

Justices Holmes, Brandeis, Stone and Sanford dissented since they were unable to see why the general considerations which, in earlier cases, had been found sufficient to create a public interest sufficient to warrant legislative regulation, were not operative in the instant case; and this view they fortified by pointing out the comprehensive scope of the conception of public interest to which the court had, in these earlier cases, committed itself.

Justice Stone in his dissenting opinion said: "To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected

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<sup>56</sup> 273 U. S. 418.

<sup>57</sup> It was also held that the act could not be justified as an exercise of the police power to prevent fraud. The court said: "One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion, or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with, *Commonwealth v. O'Brien* and others, 12 Cush. [Mass.] 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

with a public interest. It is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

"The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is 'free' competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.

"Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, as in *Munn v. Illinois*, *supra*; or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in *German Alliance Ins. Co. v. Kansas*, *supra*; or from a housing shortage growing out of a public emergency as in *Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*, 258 U. S. 242; (*cf. Chastleton Corp. v. Sinclair*, 264 U. S. 543)—the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.

"That should be the result here. We need not lay down any universal rule to apply to new and unknown situations. It is enough for the present purposes that this case falls within the scope of the earlier decisions and that the exercise of legislative power now considered was not arbitrary. . . . The economic consequence of this regulation upon individual ownership is no greater, nor is it essentially different from that inflicted by regulating rates to be charged by laundries. *Oklahoma Operating Co. v. Love*, 252 U. S. 331; by anti-monopoly laws, Sunday laws, usury statutes; *Griffith v. Connecticut*, 218 U. S. 563; *Workmen's Compensation Acts*,

New York Cen. R. Co. v. White, 243 U. S. 188; the zoning ordinance upheld in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365; or State statutes restraining the owner of land from leasing it to Japanese or Chinese aliens, upheld in *Terrace v. Thompson*, 263 U. S. 197; *Webb v. O'Brien*, 263 U. S. 313; or State prohibition laws upheld in *Mugler v. Kansas*, 123 U. S. 623; or legislation prohibiting option contracts for future sales of grain, *Booth v. Illinois*, 184 U. S. 425; of invalidating sales of stock or margin or for 'future,' *Otis v. Parke*, 187 U. S. 606; or statute preventing the maintenance of pool parlors, *Murphy v. California*, 225 U. S. 623; or in numerous other cases in which the exercise of private rights has been restrained in the public interest."

It is clear that here Justice Stone took the position, the logical character of which it is difficult to deny, that in all cases in which the regulation of private rights is concerned, practical economic or other considerations should govern, and that the court had already gone too far in its earlier decisions to refuse to accept frankly this pragmatic proposition.

Justice Holmes in his dissenting opinion<sup>58</sup> took an even more advanced position with regard to the government regulation of private business than did Justice Stone. He declared that the use by the legislatures and the courts of the term "affected with a public interest," like that of "police power" serves no other than an apologetic purpose, when government regulation of private rights is desired.<sup>59</sup> He said that he himself did not believe in the use of such apologies, and thought that the courts should frankly recognize the right of the government to regulate the exercise of private rights whenever there is any public interest which seems so to demand, and no express constitutional prohibition stands in the way. He continued: "The notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and

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<sup>58</sup> With which may be compared his dissenting opinion in *Adkins v. Children's Hospital* (261 U. S. 525).

<sup>59</sup> "When Legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the Legislature to make a part of the community uncomfortable by a change."



they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. *Mugler v. Kansas*, 123 U. S. 623. What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way."

**§ 1166. Extent to which Business Affected with a Public Interest May Be Regulated Depends upon the Nature of the Business Regulated.**

In *Wolff Packing Co. v. Court of Industrial Relations*<sup>60</sup> the court pointed out that all private businesses declared subject to legislative regulation, because affected with a public interest, are not subject to regulation to the same extent or in the same ways, but that, upon the contrary, they are subject to only that degree and kind of regulation which the public interest requires. The court said: "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

In this *Court of Industrial Relations* case it was held that, the right of employer and employee to contract with respect to wages, being a part of the "liberty" protected by the due process of law provision of the Fourteenth Amendment, that part of the *Kansas Court of Industrial Relations Act of 1920* was held void which, with respect to such businesses as the production of food and clothing and of mining, required employers to pay wages fixed by an Industrial Court, and forbade the employees to strike. The court said that while, under changed conditions of mass production, the factory or large plant having been substituted for the indi-

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<sup>60</sup> 262 U. S. 544.

vidual workshop, it had been found necessary to protect the health of employees and of the public by inspection laws and other regulations of a police character, such regulation had never extended to the fixing of wages or the prices of foods to the public except where the force of competition did not effectively operate. "There is no monopoly in the preparation of foods," said the court. "The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are countrywide, a short supply is not likely, and the danger from local monopolistic control less than ever."

To the contention that the Kansas Act was justified upon the same ground as that upon which the Adamson Act of Congress had been sustained in *Wilson v. New* <sup>61</sup> the court replied that it was enough to say "that the great temporary public exigencies recognized by all and declared by Congress were very different from that upon which the control under this act is asserted. Here it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the State and country, and thence to all the national sources of food supply, so as to produce a shortage. Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor."

Another important distinction between the instant case and that of *Wilson v. New*, which the court pointed out, was that, in the latter case, a common carrier was concerned which had accepted a railroad franchise from which it was not free to withdraw unless it could show that its continued operation was impossible without a continuous loss. The case of *Wilson v. New*, it was declared, had gone "to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of a great disaster."

#### **§ 1167. Final Determination as to Constitutional Right to Regulate Is a Judicial Question.**

As in other cases where the question of constitutionality is concerned, the courts reserve to themselves the final decision whether or not, in fact, an industry or occupation is affected with a public interest and therefore is subject, as to its charges, rates, etc., to legislative regulation. Thus, in *Wolff Packing Co. v. Court of Industrial Relations* <sup>62</sup> the court said: "The mere declaration by a legislature that a business is affected with a public

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<sup>61</sup> 243 U. S. 332.

<sup>62</sup> 262 U. S. 522.

interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."

**§ 1167a. Selling of Gasoline not Affected with a Public Interest.**

Since the foregoing sections were in type, the court has held that the selling of gasoline is not so affected with a public interest as constitutionally to justify the regulation by the States of the prices at which it may be sold.<sup>61</sup> Nothing is to be gained, said the court, by reiterating the statement that the phrase "affected with a public interest" is indefinite. It "has become the established test by which the legislative power to fix prices of commodities, or services, must be measured. . . . We are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from the great variety of other articles commonly bought and sold by merchants and private dealers in the country."

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<sup>61</sup> *Williams et al. v. Standard Oil Co. of Louisiana*. Decided January 2, 1929.

## CHAPTER XCV

### DUE PROCESS OF LAW AND THE POLICE POWER

#### § 1168. Development of the Doctrine of Police Power.

In the pages which have gone before it has been frequently necessary to refer, in justification of legislative acts, to what is called the "Police Power." It is now proposed to consider more carefully the constitutional connotation of this term.

In the sense in which the expression "police power" has come to have in this country the term is peculiar to American constitutional jurisprudence, and is a development out of the principle that the law-making powers of Congress and of the State legislatures are limited by written constitutional provisions. Indeed, in view of the force given to these constitutional provisions, and especially in view of the broad meaning, procedural and substantive, given to the requirement of due process of law, the development of a doctrine of a police power inherent in the State legislatures to override, under certain circumstances, private rights of person and property, was absolutely necessary in order that the State governments might efficiently preserve public order and secure the general welfare of their citizens.<sup>1</sup>

But, just as the wide extension of the meaning of due process of law is of comparatively recent date, so the sphere of authority at present ascribed by the courts to the police powers of the States is modern.<sup>2</sup> Indeed, as we shall see from a study of the latest cases, the State's police powers are, at the present time, in a process of rapid development, and like the struggle between Ormazd and Ahriman, the contest between the restraining power of due process of law and the legitimizing energy of police control furnishes much of the material of present-day constitutional disputes. Those who favor an extension of State control would identify the police power with the being Ormazd; while those who view with fear further inroads upon individual liberty of action and the sanctity of private property rights would

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<sup>1</sup> Strictly speaking the Federal Government cannot be said to possess police powers in the sense that the States do. It does, however, possess, in connection with the powers expressly granted it, the implied power to enact what in substance are police regulations. Thus, for example, in the exercise of its authority to regulate interstate and foreign commerce, Congress has enacted a pure food law, safety appliances acts, prohibited the transportation of lottery tickets, etc.

<sup>2</sup> The term is not defined in Bouvier's *Law Dictionary* until the edition of 1883; in 1879 it makes its first appearance as a subdivision of constitutional law in the annual supplements of the *United States Digest*. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, p. 360.

be disposed, no doubt, to view due process as the constitutional Ormazd, and the police power, in its wider extensions at least, as representing Ahriman.

The first appearance of the term "police power" in American constitutional nomenclature would seem to be in 1827 in the case of *Brown v. Maryland*,<sup>3</sup> in which Chief Justice Marshall declared that "The power to direct removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the States."<sup>4</sup> Not until ten years later, however, did the phrase recur in an opinion of the Supreme Court. This was in *Mayor of New York v. Miln*.<sup>5</sup> Here Justice Barbour quoted the words of Marshall in *Brown v. Maryland*, and Justice Thompson in his opinion said: "Can anything fall more directly within the police power and internal regulation of the State than that which concerns the care and management of paupers or convicts?"

In these early cases, and for years to follow, as Hastings in his study has made demonstrably clear, the phrase police power when it occurred was employed as a name for what the *Federalist* and later commentators had described as "the residuary sovereignty of the States," namely, that general authority not surrendered to the General Government, and reserved severally by each State to regulate in the manner that each should see fit all matters of local concern. In other words, the term was not used to designate a special branch or sphere of the States' legislative authority; rather, it was employed to mark off the sphere of State authority from that of the General Government. In this sense the phrase soon became generally current.<sup>6</sup> Gradually, however, in this contest between the States and the General Government, and especially with reference to the control of interstate commerce, there arose the practice of justifying, or attempting to justify, the enforcement by the States of regulations affecting interstate commerce, and other subjects placed within the control of the General Government, by arguing that the regulations in question were necessary or reasonably required for the protection of the health, morals or general welfare of the citizens of the States enacting them, which subjects, it was asserted, are subject to the States' control in the exercise of their residual sovereignty or police powers notwithstanding the fact that, in the exercise of this regulating power Federal concerns are incidentally affected. Thus the phrase

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<sup>3</sup> 12 Wh. 419.

<sup>4</sup> Hastings, p. 365.

<sup>5</sup> 11 Pet. 102. Cf. Hastings, p. 366.

<sup>6</sup> See especially *Prigg v. Pennsylvania* (16 Pet. 539), decided in 1842, and the *License cases* (5 How. 504), decided in 1846. In the latter cases Chief Justice Taney said: "What are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion . . . that is to say, this power of sovereignty, the power to govern men and things within the limits of its own dominions."

police power, by degrees, came, in practice, to refer not to the general residuary powers of the States but to their right to provide and enforce reasonable regulations in behalf of the morals, safety and convenience of their inhabitants, even when interstate commerce or some other subject of Federal control was incidentally or indirectly, though often substantially, affected.

Though thus growing out of the contest between Federal and State authority, the phrase "police power," when it had come to have the special meaning just referred to, began to find application as designating a field of legislative authority to regulate private rights of persons and property free from the constitutional objection that due process of law was thereby denied.

### § 1169. Police Power Defined.

One of the earliest as well as most satisfactory definitions of the police power is that of Chief Justice Shaw, given in his opinion in *Commonwealth v. Alger*<sup>7</sup> decided in 1853. He said: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor.<sup>8</sup> The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of

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<sup>7</sup> 7 Cush. 53.

<sup>8</sup> This requirement of compensation in the case of appropriation of private property under the right of eminent domain, is created in this country by express constitutional provisions. In the absence of such constitutional provisions, express and implied, the individual thus deprived of property would have no legal claim for damages. To the author it appears proper to classify the power of eminent domain under the general police powers of the State.

the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise."

Next in importance after *Commonwealth v. Alger* in developing the modern definition of police power was Chief Justice Redfield's opinion in *Thorpe v. Rutland R. R. Co.*,<sup>9</sup> decided in 1855. Here we find the following language used: "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country which resides in the law-making power in all free States. . . . This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."

With its definition and scope thus squarely asserted by Shaw and Redfield, the police power of the State almost immediately found an important application in the State courts as justifying especially the liquor and Sunday laws of the States.

#### **§ 1170. Necessity for Exercise of Police Power a Matter Primarily of Legislative Judgment.**

In *Mugler v. Kansas*<sup>10</sup> in which a State law prohibiting the sale or manufacture of intoxicating liquor was upheld as an exercise of the police power, the court used the following language: "By whom, or by what authority, is it to be determined whether the manufacture of particular drinks, either for general use or for the personal use of the maker, will injuriously affect the public? . . . Under our system of government it is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." "It does not follow," the court continued, "that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightly go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

#### **§ 1171. Legislative Determination Not Conclusive.**

In *Powell v. Pennsylvania*<sup>11</sup> the court, in sustaining a State law prohibiting the manufacture of oleomargarine, said: "Whether the manu-

<sup>9</sup> 27 Vt. 140.

<sup>10</sup> 123 U. S. 623.

<sup>11</sup> 127 U. S. 678.

facture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such a manner as to prevent the manufacture and sale of such articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those fundamental questions is conclusive upon the court." The court, while repeating that not everything that is enacted by a legislature under the guise of an exercise of its police powers is necessarily to be held constitutional, said: "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary."

The language which has just been quoted, though not absolutely explicit, would seem to indicate that the court held, at that time, the doctrine that its province was restricted to a determination, in each individual case, whether or not a questioned law provided for a regulation that might fairly be termed police in character, in much the same way in which, in the original Granger cases, it had held that its jurisdiction was exhausted when it had determined that an industry affected with a public interest was subject to State regulation as to the charges which it might exact of the public. In later cases, however, the court has broadened its supervisory power over State police legislation, and has claimed the authority to determine for itself (though of course giving weight to the legislative opinion) whether the limitations imposed by the State upon the use of private property or the freedom of individual action is or is not reasonably required.

#### § 1172. Weight to Be Given to Legislative Determination.

The authority upon the part of the court itself to determine, upon a basis of fact, whether, under given circumstances, police regulation is required, does not carry with it, the court has several times taken care to assert, a claim of right to substitute its judgment for that of the legislature as to the policy or expediency of the regulation which is provided. Thus, in *Lochner v. New York*<sup>12</sup> it said: "If the act be within the power of the State, it is valid, although the judgment of the court might be totally opposed to the enactment of the law." And again in *C., B. & Q. R. R. Co.*

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<sup>12</sup> 198 U. S. 45.



v. McGuire<sup>13</sup> decided in 1911, it was said, after a review of earlier cases: "The principle involved in these decisions is that where legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the action is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. . . ."

In some instances, however, the language of the court would seem to imply a claim of power upon its part to examine not only whether a regulation in question may have some direct relation to a matter of public welfare, but, granting this, to determine whether the measure in question is a reasonable one, the end to be reached and the amount of interference with private rights being both considered; that is, in analogy with its control of State fixed railway and other public service rates, to determine not only whether the services are subject to State regulation, but whether the regulations which are provided are reasonable as regards both the public and the service companies. Thus in the words already quoted from the *Lochner* case it was declared that the question was whether the regulation was "a fair, reasonable, and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary and arbitrary interference." So, also, in *Lawton v. Steele*,<sup>14</sup> decided in 1894, it was declared that "to justify the State in thus interposing its authority in behalf of the public it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

It is clear, from the foregoing, that should the court assert to any considerable extent its authority to determine the reasonableness of police regulation, it will come perilously near, if it does not actually encroach upon, the field of legislative policy. With comparatively few exceptions, however, the Supreme Court has held a liberal view with regard to the propriety of the police laws which have come before it for examination. One of these exceptions was in the so-called *Bakery case*—*Lochner v. New York*—<sup>15</sup> which case deserves for this reason special examination.

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<sup>13</sup> 219 U. S. 549.

<sup>14</sup> 152 U. S. 133

<sup>15</sup> 196 U. S. 45.

### § 1173. The Bakery Case: *Lochner v. New York*.

The law in this case was one regulating the labor hours and other conditions of employment of adult bakers. "We think," the opinion declared, "the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this [law] to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of the baker. . . . We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee." And later it was said: "In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery, and the healthful quality of the bread made by the workman." Justice Holmes in his dissenting opinion declared that the decision was founded upon an economic theory—of *laissez faire*—which a large part of the country does not entertain, and said: "I think that the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us." In truth, however, it would seem that the decision of the court is subject to criticism not because it was founded upon a political theory no longer dominant in the community, but because, as it has already been said, the majority justices failed to give due weight to the legislative finding of fact, with reference to the necessity of the regulation for protecting the health of the employees and of the consumers of the bread baked by them. For it cannot be denied that there was sufficient evidence to show that it was not absolutely irrational for the legislature to take the position which it had assumed in this respect.

### § 1174. Employment of Women.

In *Müller v. Oregon*<sup>16</sup> the court recognized that there is a "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil," and while admitting that constitutional questions are not settled by even a consensus of public opinion, yet, "when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief con-

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<sup>16</sup> 208 U. S. 412.

cerning it is worthy of consideration.” The court then went on to state as its own belief that women, by their physical structure, are placed at a disadvantage in the struggle for subsistence, and that this is especially true when the burdens of motherhood are upon them. In this case the court upheld a law prohibiting the employment of women in laundries for more than ten hours in any one day.

**§ 1175. Opportunity for Division of Judicial Opinion as to Reasonableness of Police Measures.**

It is clear that there is abundant opportunity for differences of opinion among judges as to the reasonableness, and therefore the constitutionality, of police measures submitted to them. It is therefore not surprising to find dissents recorded in many of the decisions of the Supreme Court in cases of this class. During recent years it would appear that Justices Holmes, Brandeis and Stone have been more strongly disposed than the other justices to give the benefit of the doubt as to reasonableness to the legislative judgment; whereas Justices Butler and Sutherland have been disposed to grant such slight presumptive value to this legislative judgment as to leave themselves substantially free to determine the constitutionality of police measures largely upon their own individual judgment as to the reasonableness or even the expediency of the measures examined by them. In this respect they have reverted to substantially the attitude which the majority of the court took in the *New York Bakery* case.<sup>17</sup> The other justices of the court have held less extreme views than either Justices Holmes, Brandeis and Stone or Justices Butler and Sutherland, with the result that in some cases they have agreed with the first group of justices and thus provided a majority for sustaining the constitutionality of the laws in question; in other cases they have sided with the latter two justices and thus provided a majority in opposition to the validity of the measures examined.<sup>18</sup>

Examples of comparatively recent cases in which the court has construed with strictness constitutional limitations and correspondingly limited discretionary legislative powers are those of *Burns Bakery Co. v. Bryan*,<sup>19</sup> *Schlesinger v. Wisconsin*,<sup>20</sup> *Weaver v. Palmer Bros. Co.*,<sup>21</sup> and the Minimum Wage case of *Adkins v. Children's Hospital*.<sup>22</sup> The Minimum Wage case is elsewhere discussed in detail. The other cases just mentioned may be here described.

In the *Burns Bakery* case was held unconstitutional as in denial of due process of law, substantively considered, a statute which required bread manufactured in quantities of twenty-five loaves or more to main-

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<sup>17</sup> *Lochner v. New York* (198 U. S. 45).

<sup>18</sup> Cf. the observations of Professor Robert E. Cushman in 21 *American Political Science Review*, 84-86.

<sup>19</sup> 264 U. S. 504.

<sup>20</sup> 270 U. S. 230.

<sup>21</sup> 270 U. S. 402.

<sup>22</sup> 261 U. S. 525.

tain a specified weight twenty-four hours after baking, within a limit of variation so narrow as to permit the required weight to be maintained only if the loaves should be wrapped or otherwise artificially protected. This requirement, Justice Butler, speaking for the majority of the court found, by the evidence in the case, to be unreasonable. Justices Brandeis and Holmes, dissenting, said that the court was not properly concerned with the wisdom of the act, and, as a measure for protecting the purchasers of the bread against fraud, arising out of concealed underweight, said: "The determination of these questions involves an inquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious." And, later: "It is not our province to weigh evidence. Put at its highest, our function is to determine . . . whether the provision, as applied, is so clearly arbitrary or capricious that legislators, acting reasonably, could not have believed it to be necessary or appropriate for the public welfare."

In *Schlesinger v. Wisconsin*<sup>23</sup> the constitutional question involved was as to whether equal protection of the laws, and not due process of law, had been denied, but the case illustrates the point under discussion. The majority of the court, speaking through Justice McReynolds, held void the provision of a State tax law which levied an inheritance tax on gifts made within six years of death, the assumption being that such gifts were made in contemplation of death. The court, finding that there was no reasonable ground for this classification of gifts which should be subject to the tax while other gifts should go untaxed, held that by the provision the equal protection of the laws was denied. Justices Holmes, Brandeis and Stone dissented. Justice Holmes who prepared the dissenting opinion took the occasion to say: "If the 14th Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But, even now, it seems to me not too late to urge that in dealing with State legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate. . . . I am not prepared to say that the legislature of Wisconsin, which is better able to judge than I am, might not believe, as the supreme court of the State confidently affirms, that by far the larger proportion of the gifts coming under the statute actually were made in contemplation of death."

In *Weaver v. Palmer Bros. Co.*<sup>24</sup> the court held void as a denial of due process of law a State statutory provision which prohibited the use of shoddy, new or old, sterilized or unsterilized, in the manufacture of com-

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<sup>23</sup> 270 U. S. 230.

<sup>24</sup> 270 U. S. 402.

comfortables for beds. Justice Butler, speaking for the majority of the court, said that there was no evidence that sickness or disease had ever been caused by the use of shoddy; that shoddy-filled comfortables were useful articles for which there was much demand; and that "it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden." Justices Holmes, Brandeis and Stone dissented, and Justice Holmes who prepared the dissenting opinion again took occasion to say: "If the legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law. The legislature may have been of opinion further that the actual practice of filling comfortables with unsterilized shoddy gathered from filthy floors was widespread, and this again we must assume to be true. It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery."

### § 1176. The General Scope of the Police Power.

From what has been said it sufficiently appears that the police power knows no definite limits. It extends to every possible phase of what the courts deem to be the public welfare:—it is a general right upon the part of the public authority to abridge, or, if necessary, to destroy, without compensation, the property or contract rights of individuals, and to control their conduct in so far as this may be necessary for the protection of the community or of a particular class of the community, against danger in any form, against fraud, or vice, or economic oppression, or even for the securing of the public convenience. As is said in the *Bank Guaranty* case, "It may be said in a general way that the police power extends to all the great public needs." And in *C., B. & Q. R. R. Co. v. Grimwood*,<sup>25</sup> decided in 1906, the court said: "We hold that the police power of a State embraces regulations designed to promote the public convenience and general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."<sup>26</sup>

In *Bacon v. Walker* <sup>27</sup> the court defined the police power as embracing

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<sup>25</sup> 200 U. S. 561.

<sup>26</sup> See also *Lake Shore & M. C. R. R. Co. v. Ohio* (173 U. S. 205).

<sup>27</sup> 204 U. S. 311.

"regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

In *Eubank v. Richmond*<sup>28</sup> the court said of the police power: "It extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

### § 1177. Police Power and Right to Regulate Public Utilities Distinguished.

The power that is recognized to be possessed by the State for the regulation of industries of a public character, or industries affected with a public interest, is deduced from the peculiar public, or partly public character, of the industries regulated. The field open for legal regulation is thus a comparatively limited one even though its boundaries are somewhat indefinite. The right of control exercisable under the police power is, however, coextensive with the social and economic activities of men, and finds its limits not in the public or *quasi*-public character of the industries affected, but in the nature of the acts forbidden or required, and founds its justification upon the direct relation of these acts to the public welfare.

The fundamental principle which is held to justify this exercise of State power is that no one shall so use his property or exercise any of his legal rights (*i. e.*, legal in the sense of not being forbidden by law) as injuriously to interfere with or affect the property or other legal rights of others. The guiding maxim is *sic utere tuo et alienum non lædas*. The purpose and possible result of the police law being shown, the fact that, indirectly, private interests or property values are affected, becomes immaterial, and the persons detrimentally affected have no claim upon the State for compensation. Theirs is a case of *damnum absque injuria*.

### § 1178. Development of Doctrine of Police Power by the Supreme Court.

With the ratification in 1868 of the Fourteenth Amendment with its requirement that no State shall deny due process of law to any person, the way was opened to a revision in the Federal Supreme Court of decisions of State courts upholding State laws regulating private rights as legitimate exercises of police power, and, in the famous *Slaughter House* cases,<sup>29</sup> decided in 1873, we find the issue raised with reference to a State law regulating the slaughtering of cattle in the city of New Orleans and vicinity, and providing, *inter alia*, that a certain corporation therein chartered should have the exclusive right of maintaining slaughter yards and

<sup>28</sup> 226 U. S. 137.

<sup>29</sup> 16 Wall. 36.

houses. The validity of this law was attacked upon three Federal grounds: that it was in violation of the Thirteenth Amendment prohibiting involuntary servitude; that it violated the Fourteenth Amendment in that it abridged the privileges and immunities of citizens of the United States; and that it deprived persons of property and liberty without due process of law, and denied to them the equal protection of the laws. The majority of the court discussed the first and second of these claims with very great care. The third claim, however, which the court at the present time would undoubtedly consider very carefully, the justices dismissed almost without argument, and even ventured the assertion regarding due process and equal protection of the laws that "we doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case will be necessary for its application to any other."

Of fundamental importance, however, as to the location of police power under the Federal Constitution as altered by the Fourteenth Amendment, was the decision of the court that the "privileges and immunities of citizens of the United States," which the Amendment declares exempted from State regulation are only those privileges and immunities which are peculiar to and arise out of Federal citizenship. The tremendous significance of this decision is seen when, as the majority of the court pointed out, the results that would follow from the broader interpretation of these principles and immunities which was contended for, are taken into consideration. Had the court, as it was strenuously urged to do, held that these: "privileges and immunities" refer generally to all the rights attaching to free citizenship, the result, taken in connection with the enforcement clause of the Amendment, would have been to transfer to possible Federal definition and regulation practically the entire body of private rights of person and property and thus to have denied to the States and given to the Federal Government the police powers which the former are recognized to have. Later decisions of the court have of course overruled the doctrine above quoted that the operation of the due process and equal protection clauses of the Amendment would be confined to cases in which the negroes are discriminated against as a class by State laws. Indeed, almost immediately the court found itself compelled to assert its right under the Amendment to determine in the final instance whether a State law or the authorized act of a State official, irrespective of its application to the negro race, is a legitimate exercise of governmental power, police or otherwise, and if found to be not such, to hold it unconstitutional and void as denying either due process of law or the equal protection of the laws, or both. In the very year in which the Slaughter House cases were decided, the court assumed jurisdiction under the Fourteenth Amendment in the case of

*Bartemeyer v. Iowa*,<sup>30</sup> in which no race question was involved. The law attacked in this case was a prohibitory liquor law, which, it was claimed, operated to deprive the plaintiff in error of his property without due process of law, as well as to abridge his privileges and immunities as a citizen of the United States. As regards the latter claim the court re-affirmed its position in the *Slaughter House* cases, and as regards the question of due process, held that the law was a proper police regulation. In *Munn v. Illinois*,<sup>31</sup> decided in 1876, the court, as is elsewhere noted, upheld the power of the States to regulate the services and charges of industries "affected with a public interest." This position was rested fundamentally upon the analogy between property devoted by its owner "to a use in which the public has an interest," and property essentially public in character. Not a little of the opinion, however, seemed to view the State's power in the premises as a police power, and, in accordance therewith it was declared that the regulations legislatively fixed were not subject to judicial review as to their reasonableness and justice.

#### § 1179. States May Not Abandon or Contract Away Their Police Powers.

In 1878 in *Fertilizing Co. v. Hyde Park*,<sup>32</sup> the police power of the States to conserve and promote the health and comfort of their citizens was pitted against their obligation to respect the obligation of their contracts. Here the State had, by an act of its legislature, created a corporation and granted to it for a term of years authority to manufacture fertilizers within certain designated areas. The village of Hyde Park having grown up within this area, and the manufacturing of fertilizers having become a nuisance to its inhabitants, the village, authorized by its charter from the State, issued certain ordinances which, in intent were, and in effect would be, if enforced, to prevent the fertilizing corporation from continuing its business. These ordinances, though they nullified the charter grant, which the *Dartmouth College* case had held to be a contract on the part of the State, the Supreme Court upheld, partly upon the ground that the charter of the company had not specifically provided for its exemption from a possible exercise of the police power, but really, and fundamentally, upon the principle that the State may not, by contract, estop itself from an exercise of its police power. And the next year (1879) in *Stone v. Mississippi* <sup>33</sup> the court said explicitly: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both of these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require."

To much the same effect was the language and doctrine of the court in

<sup>30</sup> 18 Wall. 129.

<sup>31</sup> 94 U. S. 113.

<sup>32</sup> 97 U. S. 659.

<sup>33</sup> 101 U. S. 814.



Butchers' Union Slaughter House Co. v. Crescent City Slaughter House Co.,<sup>34</sup> decided a few years later. The court there said: "No one can examine the provisions of the act of 1869 with the knowledge that they were accepted by the Crescent City Co. and so far acted on that a very large amount of money was expended in a vast slaughter house, and an equally extensive stock-yard and landing place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration. It admits of a little doubt that the ordinance of the city of New Orleans, under the new constitution, impaired the supposed obligation imposed by these provisions on the State, by taking away the exclusive rights of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract.

"While we are not prepared to say that the legislature can make valid contracts on no subjects embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the public welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

In *Atlantic Coast Line R. Co. v. Goldsboro*<sup>35</sup> the court said: "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

#### **§ 1180. Limited Right to Regulate or to Prohibit the Innocuous along with the Noxious.**

The police power may not be employed to prevent evils of a remote or highly problematical character nor may its exercise be justified when the restraint imposed upon the exercise of private rights is disproportionate to the amount of evil that will be corrected. However, the fact that, as a matter of practical operation, innocent parties or property will necessarily be affected to some slight extent, will not render the regulation unconstitutional. Furthermore, acts innocent in themselves may be ordered or prohibited if this be practically necessary in order to secure an efficient enforcement of a valid police order. Thus, in *Purity Extract and Tonic Company v. C. C. Lynch*<sup>36</sup> it was held that local sales of malt liquors, whether intoxi-

<sup>34</sup> 111 U. S. 746.

<sup>35</sup> 232 U. S. 548.

<sup>36</sup> 226 U. S. 192.

cants or not, might be forbidden in the exercise of the State's power to prohibit the sale of intoxicating liquors, because experience had shown that if the sale of the former were permitted, it would not be possible effectively to prevent the sale of the latter under the guise of the former. The court said: "The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."

In *Village of Euclid v. Ambler Realty Co.*<sup>37</sup> the court, with reference to a "zoning" ordinance which was declared reasonable, said that the general exclusion from certain zones of all industrial establishments might carry with it some establishments for the exclusion of which there might not be justification, "but," said the court, "this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves."<sup>38</sup> The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation."

While thus holding that the zoning ordinance was, in its general character, reasonable as a police measure, the court pointed out that, as applied to specific pieces of property, or under specific circumstances, it might be held unreasonable. The court said: "It is true that when, if ever, the provisions set forth in the ordinance . . . come to be concretely applied to particular premises . . . or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. . . . The decree sought here [which the court refused] is . . . an injunction against the enforcement of any of the restrictions, limitations or conditions of the ordinance."

In *Everards Breweries v. Day*<sup>39</sup> the court with reference to and in support of the constitutionality of the prohibition by Congress of the traffic in intoxicating malt liquors for medicinal purposes, said: "The opportunity to manufacture, sell, and prescribe intoxicating malt liquors for 'medicinal purposes' opens many doors to clandestine traffic in them as beverages

<sup>37</sup> 272 U. S. 365.

<sup>38</sup> Citing *Hebe Co. v. Shaw* (248 U. S. 297); *Pierce Oil Corp. v. City of Hope* (248 U. S. 498).

<sup>39</sup> 265 U. S. 545.

under the guise of medicines, facilitates many frauds, subterfuges and artifices; aids evasion, and thereby and to that extent hampers and obstructs the enforcement of the Eighteenth Amendment."

However, this doctrine in justification of the inclusion of what may be termed innocent acts may be applied only as a means to a legitimate end, and may not be relied upon to sustain a measure so loosely or broadly drawn as to bring within its scope matters which are not properly subject to police regulation or prohibition. Thus, in *Tyson and Bro. v. Banton*<sup>40</sup> the court said with reference to the State law under examination, which sought to control the resale price of theatre tickets: "One vice of the contention [that the law might be sustained as a police measure to prevent fraud] is that the statute itself ignores righteous distinctions between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion . . . and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers may be caught."

It was upon this ground that, in *Adams v. Tanner*,<sup>41</sup> the court held unconstitutional a State law which made criminal the collecting by employment agencies of fees from workers for furnishing them with employment or with information leading to such employment. The court recognized that there was opportunity for defrauding and oppressing persons applying to such agencies, but said that this fact did not justify the prohibition of all such agencies, or rather, but what amounted to the same thing, the prohibition of the exacting by such agencies of fees for their services. The court said: "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession (possibly no business), which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully conducted agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranty of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."<sup>42</sup>

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<sup>40</sup> 273 U. S. 418.

<sup>41</sup> 244 U. S. 590.

<sup>42</sup> Justice Brandeis filed a dissenting opinion in which he reviewed at length the character of employment agencies, the evils inherent in or practiced by them, the various possible remedies for these evils, and the conditions actually existing in the State of Washington which had enacted the statute, as shown by a report of the United States Department of Labor. Justice Holmes and Justice Clarke concurred in this dissent.

### § 1181. Taxation as a Mode of Exercising Police Regulation.

Police regulations may assume any form of control reasonably calculated to achieve the end aimed at. Thus, at times, stamp taxes and other forms of assessments resembling taxes have been imposed not so much for the purpose of the revenues to be derived from them as for the purpose of administrative control.<sup>43</sup> When this is done the validity of the statutory requirements is determined upon the basis of the police power and not that of the taxing power.

### § 1182. The Police Power and Compensation for Injuries Due to Its Exercise.

Sufficient has now been said to define and illustrate the potential scope of the police power. It is seen that this power resembles those of taxation and eminent domain not only in the fact that, like those powers, it involves an authority upon the part of the State to invade private property rights, but that its exercise must be founded upon a basis of public, as distinguished from private, use or interest.

There are, however, these essential differences between the police power and those of taxation and eminent domain that, under the police power, private property cannot, except in very special cases, which will be presently considered, be taken by the government (though it is sometimes destroyed) but only its use regulated, and, second, that when, through restraint in its use, the value of property is depreciated or destroyed, no compensation may be recovered from the State by its owner. This principle is stated in fixed terms by the court in *Mugler v. Kansas*.<sup>44</sup> In that case the court said: "As already stated the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but,

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Justice McKenna also dissented in a six-line opinion upon the ground that "under the decisions of this court, some of them so late as to require no citations or review,—the law in question is a valid exercise of the police power of the State, directed against a demonstrated evil."

<sup>43</sup> See Section 379, as to the use of taxes for other than revenue purposes.

<sup>44</sup> 123 U. S. 623.

under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not,—and consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses which they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from a taking of property for a public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other unoffending property is taken away from an innocent owner.

“It is true that when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacturing of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*,<sup>45</sup> the supervision of the public health and the public morals is a governmental power, “continuing in its nature,” and “to be dealt with as the special exigencies of the moment require;” and that, “for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.” So, also, in *Boston Beer Co. v. Massachusetts*,<sup>46</sup> the court said: “If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.”<sup>47</sup> This principle of *damnum absque injuria* is pushed to its extreme limits.<sup>48</sup>

<sup>45</sup> 101 U. S. 814.

<sup>46</sup> 97 U. S. 32.

<sup>47</sup> The doctrine that an injury to property by an exercise of the police power is to the owner *damnum absque injuria* is as old as that of the police power itself. Thus in *Commonwealth v. Alger* (7 Cush. 53) decided in 1851, the court, after defining the police power, said: “This is very different from the right of eminent domain, the right of a government to take and appropriate private property to a public use, whenever the public exigency requires it; which can be done only on condition of providing reasonable compensation therefor. The power we allude to is rather the police power. . . .

“Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner.”

<sup>48</sup> See, for example, *Railway v. Drainage Commissioners* (200 U. S. 561), and cases there cited. A very recent instance is that of *Mo. Pacific Ry. Co. v. Omaha* (197 Fed.

### § 1183. The Taking of Private Property under the Police Power.

The primary purpose of the police power, as well as that of eminent domain and taxation, is protection or prevention—that persons may be restrained from so exercising their private rights of property, contract, or conduct as to infringe the equal rights of others or to prejudice the interests of the community. It may, therefore, be said, generally, that under none of these powers may private property be taken, with or without compensation, for a private use. We have now to ask whether, under any considerations, private property may be not simply regulated as to its use, or destroyed if in itself noxious, but directly appropriated by the State, or its transfer by its owner to other private hands compelled.

The destruction of the values of property through the exercise of the police power was earlier viewed by the courts with a more hostile eye than is now the case. Thus, in the famous case of *Wynehamer v. People*<sup>49</sup> the court said: "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary powers." In 1873 in the early liquor case of *Bartemeyer v. Iowa*<sup>50</sup> the court declared that if the prohibition law was applied to liquor already and legally held in private hands at the time the law was passed a grave question would arise as to its constitutionality under the Fourteenth Amendment. And in *Boston Beer Co. v. Massachusetts*,<sup>51</sup> the court, without deciding the point, nevertheless said: "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for a public good without compensation, but we infer that liquor in this case, as in the case of *Bartemeyer v. Iowa*, was not in existence when the liquor law of Massachusetts was passed."

However, ten years later, in *Mugler v. Kansas*,<sup>52</sup> the court committed itself<sup>53</sup> to the doctrine that no constitutional objection can be made to a police measure, otherwise valid, which, without compensation provided for, in its operation, deprives of value private property existing at the time the law is passed.<sup>54</sup>

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Rep. 516), decided in 1912, in which a city ordinance was upheld which required a steam railroad to construct entirely at its own expense over its tracks a viaduct strong enough and of sufficient dimensions to enable it to accommodate not only pedestrians and ordinary vehicles, but to carry a street railroad.

<sup>49</sup> 13 N. Y. 378.

<sup>50</sup> 18 Wall. 129.

<sup>51</sup> 97 U. S. 25 (1877).

<sup>52</sup> 123 U. S. 623.

<sup>53</sup> Field dissenting.

<sup>54</sup> See also *Crowley v. Christensen* (137 U. S. 86).

The destruction of the value of property by prohibiting the use of it for the only purpose for which it is adopted, is, however, sharply distinguished from its actual taking.

This point was acutely considered in two cases, the one in the Federal Supreme Court and the other in the Court of Appeals of the State of New York. In the former the police law in issue was sustained; in the latter the law was held void. These two cases we shall consider in some detail.

#### § 1184. State Bank Guaranty Case.

In *Noble State Bank v. Haskell*,<sup>55</sup> decided in 1911, the Supreme Court upheld the State Bank Guarantee Law of Oklahoma, which provided for the compulsory levy and collection of assessments based upon average daily deposits, from State banks, for the purpose of creating a guaranty fund for the payment in full of all depositors of such banks as might become insolvent; and which also provided that no individual or corporation should do a banking business in the State except under this law. Justice Holmes, speaking for a unanimous court, admitted that there was no denying that by the Oklahoma law a portion of the bank's property might be taken to pay the debts of an insolvent rival. Nevertheless, he said there were counteracting considerations in support of the validity of the law. "In the first place," he said, "it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use,<sup>56</sup> and, in the next, it would seem that there may be other cases besides the everyday one of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume.<sup>57</sup> At least if we have a case within the reasonable exercise of the police power as above explained, no more need be said." He then went on to speak in the following broad language with reference to the police power: "It may be said in a general way that the police power extends to all the great public needs.<sup>58</sup> It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits,

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<sup>55</sup> 219 U. S. 104 (on petition for rehearing), (219 U. S. 575). See also *Shallenberger v. Bank of Holstein* (219 U. S. 104), and *Assaria State Bank v. Dolley* (219 U. S. 121).

<sup>56</sup> Citing *Clark v. Nash* (198 U. S. 361); *Strickley v. Highland Boy Gold Mining Co.* (200 U. S. 527); *Offield v. N. Y., N. H. & H. R. Ry. Co.* (203 U. S. 372); *Bacon v. Walker* (204 U. S. 311).

<sup>57</sup> Citing *Ohio Oil Co. v. Indiana* (177 U. S. 190).

<sup>58</sup> *Camfield v. United States* (167 U. S. 518).

to such an extent do checks replace currency in daily business. If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. . . . It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

On motion for rehearing Justice Holmes somewhat modified, or at least explained, some of the language which has been quoted. After referring to cases referred to in the original opinion, he declared that they were cited to establish "not that property might be taken for a private use, but that, among the public uses for which it might be taken, were some which, if looked at in their immediate aspect, according to the proximate effect of the taking, might seem to be private." "This case," he added, "in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state. We have given what we deem sufficient reason for holding that such a condition may be imposed."

From the quotations that have been made, it is reasonably clear that, with reference to the police power, the chief importance of the Bank Guarantee case consists in the liberal position which the court took with reference to the question as to what constitutes a public, as distinguished from a private, use; that is, in construing what was proximately a direct taking of private property, to be, in fact, but an incidental taking—one incidental to the realization of the ultimate public purpose which the law was declared to have in view. Thus viewed, the statement that "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use," was hardly justified, for it would seem that the only essential point was whether or not the real purpose of the regulation was a public one. This decided in the affirmative, it would follow that any incidental damage to private individuals, whether insignificant or not, would be *absque injuria*. At least this would be so where the amount of private property taken is not so disproportionate to the public interest to be subserved, that the court would feel justified in holding the law either unreasonable, or disingenuous. At any rate, it is not proper to take from its context, and ascribe any new and radical doctrine to, the general statement of Justice Holmes that the police power "may be put



forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Having sustained the law as a legitimate exercise of the State's police power, the court went on to declare the further doctrine that, in fact, the banking business is one of such special character that no one can be said to have a vested right to engage in it, and, therefore, to complain if he is excluded from it or permitted to engage in it only upon such terms as the State may see fit to impose. As to this the court said: "The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing upon the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above described coöperation are necessary safeguards, this court certainly cannot say that it is wrong."<sup>59</sup>

#### § 1185. Professions or Occupations: Right to Pursue.

It is well established that, for the purpose of protecting the health of their citizens or for guarding them against fraud, the right of individuals to pursue certain professions may be conditioned upon the possession by such individuals of certain personal qualifications either by way of personal or moral qualities or of technical attainments; and, therefore, that, for entrance to such professions a license obtained from the State may be demanded. Among such callings or professions may be instanced those of physicians, dentists, druggists, engineers, barbers, plumbers, private detectives, pawnbrokers, auctioneers, peddlers, not to mention many others. The State cases upon this point are very numerous, but all agree upon the general principle. The only diversity of opinion has been, in specific instances, as to whether a profession or calling is of such a nature as to justify police regulation, or as to whether, if subject to such State control, the regulations prescribed have been reasonable in character.

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<sup>59</sup> Citing *State ex rel. Goodwill v. Woodmansee* (1 N. D. 246); *Brady v. Mattern* (125 Iowa, 158); *Weed v. Bergh* (141 Wis. 569); *Com. v. Vrooman* (164 Pa. 306); *Myers v. Irwin* (2 Serg. & R. 368); *Myers v. Manhattan Bank* (20 Ohio, 283, 302); *Atty. Gen. v. Utica Ins. Co.* (2 Johns. Ch. 371, 377).

A few of these cases have reached the Supreme Court of the United States. In *Smith v. Texas*<sup>60</sup> was involved a State law which made it a misdemeanor for any person to act as a conductor on a railway train in the State without having previously had two years' experience as a freight conductor or brakeman. The court reaffirmed the doctrine that if a service is public, the State may prescribe qualifications and require an examination to test the fitness of persons to engage in or remain in the calling,<sup>61</sup> but added: "As the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.'"<sup>62</sup> As to the law questioned in the instant case, the court pointed out that, under it, four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, were given no chance to show their competency, but were arbitrarily denied the right to act as conductors. For example, said the court, no reason is suggested why a brakeman on a passenger train or an engineer on a freight train should be denied the right to serve in a position that a brakeman on a freight train is permitted to fill. "A statute which permits the brakeman to act,—because he is presumptively competent,—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen, and operates to establish rules of promotion in a private employment."

In *Adams v. Tanner*<sup>63</sup> the court held invalid a State law which, in effect, prohibited the operation of employment agencies in the State. The court held that such agencies were, by reason of their nature, subject to police regulation, but not to general or absolute prohibition irrespective of how they might be carried on. "We think it plain," said the court, "that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand."

In *Dent v. West Virginia*,<sup>64</sup> the constitutional right of the States to require examinations of physicians, to test their technical attainments for practicing their profession was fully examined and upheld. This was again affirmed in *Watson v. Maryland*.<sup>65</sup>

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<sup>60</sup> 233 U. S. 630.

<sup>61</sup> Citing *Re Lockwood* (154 U. S. 116); *Hawker v. New York* (170 U. S. 189); *Watson v. Maryland* (218 U. S. 173).

<sup>62</sup> Citing *Lawton v. Steele* (152 U. S. 137).

<sup>63</sup> 244 U. S. 590.

<sup>64</sup> 129 U. S. 114.

<sup>65</sup> 218 U. S. 173.

In *Lambert v. Yellowley* <sup>66</sup> it was held that the liberty of physicians or of their patients was not unconstitutionally denied by the provision of the National Prohibition Act of 1919,<sup>67</sup> as supplemented by the act of 1923 <sup>68</sup> which limits the amount of spirituous liquor which physicians may prescribe. To the contention of the plaintiff, a qualified physician, that he believed that the use of spirituous liquors in larger amounts than that permitted by the act was sometimes both advisable and necessary, the court replied: "Of course his belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown to Congress to be the minor fraction of his profession. Besides, there is no right to practice medicine which is not subordinate to the police power of the States." <sup>69</sup>

In an earlier case <sup>70</sup> the court had held that it could not say that the prohibition of traffic in intoxicating malt liquors for medicinal purposes had no real or substantial relation to the enforcement of the Eighteenth Amendment.

#### § 1186. Pharmacies.

In *Liggett Co. v. Baldridge* <sup>71</sup> a State law was held not to be a justified exercise of the police power which provided that every pharmacy or drug store should be owned only by a licensed pharmacist, and that no corporation, association or copartnership should own a pharmacy or drug store unless all the partners or members thereof were licensed pharmacists. The court, while conceding that the State might regulate the prescription, compounding of prescriptions, and the purchase and sale of medicines by appropriate legislation to the extent necessary to protect the public health, could find no reason why the public health was endangered by the character of the persons who might have title to premises used for the compounding of prescriptions or the purchase and sale of drugs. "The claim," said the court, "that the mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon mere conjecture, unsupported by anything of substance." <sup>72</sup>

#### § 1187. Control of Natural Resources such as Oil and Gas.

The courts have recognized upon the part of governments the right to exercise a certain amount of control over the reduction to possession of natural resources such as oil and gas with a view to preventing their waste,

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<sup>66</sup> 272 U. S. 581.

<sup>67</sup> 41 Stat. at L. 305.

<sup>68</sup> 42 Stat. at L. 222.

<sup>69</sup> Citing *Dent v. West Virginia* (129 U. S. 114); *Collins v. Texas* (223 U. S. 288); *Crane v. Johnson* (242 U. S. 339); and *Graves v. Minnesota* (272 U. S. 425). Four justices dissented in the instant case.

<sup>70</sup> *Everard's Breweries v. Day* (265 U. S. 545).

<sup>71</sup> Decided November 19, 1928.

<sup>72</sup> Justices Holmes and Brandeis dissented.

and thus conserving the natural supplies of them. This, though an interference with private property rights, the courts have justified as measures for the protection or promotion of the general welfare. Two important cases in the Supreme Court will illustrate this.

In *Lindsley v. Natural Carbonic Gas Co.*,<sup>73</sup> the court upheld a State law which made the engaging in pumping mineral waters from wells bored or drilled into rock for the purpose of collecting and vending the carbonic acid gas contained therein *prima facie* evidence of a common underground source of supply and as producing injury to other proprietors, and, therefore, as justifying a prohibition of the pumping or artificial drawing off of unnatural quantities of such mineral waters. Quoting from an earlier decision of the court with reference to petroleum oil,<sup>74</sup> the court, with reference to the right of the owners to take the oil found beneath the surface of lands owned by them, said: "They [meaning the surface owners] could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances, which, in the nature of things, are united, though separate. It follows, from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste. . . . Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law . . . in substance is a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."

In *Walls v. Midland Carbon Co.*,<sup>75</sup> the court upheld a State law which prohibited the use of natural gas for the manufacture of carbon or other products without using the heat generated thereby for other industrial or domestic purposes. In other words, it was held to be a reasonable police measure to prevent a wasteful use of the natural gas which, it was anticipated, would deplete the general natural supply to the detriment of the welfare of the people of the State.

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<sup>73</sup> 220 U. S. 61.

<sup>74</sup> *Ohio Oil Co. v. Indiana* (177 U. S. 190).

<sup>75</sup> 254 U. S. 300.

**§ 1188. "Blue Sky" Laws.**

In a considerable number of States since 1910, laws known as "Blue Sky Laws," have been passed to protect the public against the sale of fraudulent securities. The constitutionality of several of these measures was considered by the Supreme Court in the three cases, decided in 1917, of *Hall v. Geiger-Jones Co.*,<sup>76</sup> *Caldwell v. Sioux Falls Stock Yards Co.*,<sup>77</sup> and *Merrick v. N. W. Halsey & Co.*<sup>78</sup>

In the first of these cases the law, which the court sustained, had conferred upon the Superintendent of Banks and Banking of the State the authority, as a condition to granting a license to deal in corporate or *quasi*-corporate securities, that he should be satisfied of the good repute in business of the selling agents of the applicants for a license, and that he might revoke or refuse to renew such licenses upon ascertaining that the applicants were of bad business repute, or had violated any of the provisions of the act, or had engaged or were about to engage, under favor of such licenses, in illegitimate business or fraudulent transactions. To the charge that power of an unconstitutional arbitrary character was thus attempted to be vested in the Superintendent, the court replied that reputation and character are quite tangible attributes, but, not being subject to a legislative definition that automatically attaches to or identifies the individuals possessing them, the aid of executive agents must be invoked; that the presumption is that these agents will exercise their functions in the public interest and not wantonly or arbitrarily; and that, moreover, the statute made provision for a judicial review of the action taken by these agents. To the contention that the statute sought to shield purchasers from loss of property arising out of "defective judgment," and thus, as it were, placed them, as well as the sellers, under guardianship, the court said: "If we may suppose that such purchasers would assert a liberty to form a 'defective judgment,' and resent means of information as a limitation of their freedom, we must wait until they themselves appear to do so. Besides, they are examples in legislation of unsolicited protection, and there is much in the business we are considering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business, and that it tempts to and facilitates speculative judgments, if the purpose be trading, improvident judgments, if the purpose be investment. Whatever detriment may come from such judgments the law may be powerless to prevent; but against counterfeits of value the law can give protection, and such is the purpose of the statute under review."

In *Caldwell v. Sioux Falls Stock Yards Co.*,<sup>79</sup> the Supreme Court upheld a State statute which, with certain exceptions and exemptions, forbade

<sup>76</sup> 242 U. S. 539.

<sup>77</sup> 242 U. S. 559.

<sup>78</sup> 242 U. S. 568.

<sup>79</sup> 242 U. S. 559.

the sale of corporate or *quasi*-corporate securities which had not first received the approval of the State Securities Commission, which approval could be obtained only after certain prescribed data had been filed with the Commission, and which further provided that dealers in such securities should obtain a license from the Commission, and forbade such dealers to deal in other than securities approved by the Commission, or to transact business on any other plan than that contained in statements filed by them with the Commission.

In *Merrick v. Halsey & Co.*,<sup>80</sup> a law substantially similar to that questioned in the *Caldwell* case was sustained.

In *Broadnax v. Missouri* <sup>81</sup> it was held that a State might declare criminal the keeping of a place where corporate stocks and bonds and grains, provisions, and other commodities are bought and sold, but not paid for and delivered at the time, and where no complete record of the transactions, including a minute of the time of delivery, is made in a book kept for the purpose, and no memorandum of the sale properly stamped is given to the purchaser.

#### § 1189. Trading Stamps.

The use by many merchants of issuing trading stamps or coupons in connection with their retail sales, which stamps or coupons purport to be redeemable, when a sufficient number are obtained, in goods, has in many States been viewed with disfavor, with the result that those States have imposed special burdens upon the practice which, in some cases, have been prohibitive in effect. In most of the States these laws have been held invalid as arbitrarily discriminating against a legitimate business practice. However, in *Rast v. Van Deman & Lewis Co.*,<sup>82</sup> *Tanner v. Little*,<sup>83</sup> and *Pitney v. Washington*,<sup>84</sup> three cases decided at the same time, the Supreme Court sustained statutes of this kind.

In *Rast v. Van Deman & Lewis Co.* the questioned law imposed license fees upon merchants, druggists and storekeepers, the amount of which was determined by the cash value of their stocks of merchandise, and further provided for the payment of additional fees by persons, firms or corporations which should "offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness, or liability." The instant suit was to restrain the State officers from enforcing this statute. Sustaining the validity of the law, the court held that interstate commerce was not interfered with and that the distinction made between merchants and others who used and those who did not use the trade stamps or coupons was not an arbitrary and unreasonable one so

<sup>80</sup> 242 U. S. 568.

<sup>81</sup> 219 U. S. 285.

<sup>82</sup> 240 U. S. 342.

<sup>83</sup> 240 U. S. 369.

<sup>84</sup> 240 U. S. 87.

as to bring it within the provision of the Fourteenth Amendment, as to the equal protection of the laws, and that, as to due process of law, the liberty to contract was not unduly infringed. As to this last point, the court found that there was in the States, as expressed in their laws and in the decisions of their courts, a conflict of opinion as to the noxious character of the practice of issuing trading stamps or coupons, and that, under the circumstances, the Supreme Court did not feel itself justified in substituting its judgment for that of the State legislatures which had declared the practice to be opposed to the general welfare. Characterizing the schemes the court said: "They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity to lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it had may be a matter of inquiry and of judgment that is finally within the power of the legislature to make."

#### § 1190. Zoning.

In *Welch v. Swasey*<sup>85</sup> a law regulating the heights of buildings, when shown to be reasonably necessary for the safety, comfort and convenience of the public, was upheld. In many cities, building regulations have gone beyond this and have attempted to divide the cities into "zones" or districts within each of which only specifically described buildings may be erected. Usually, these zones have been of three classes: residence, business, and unrestricted. In *Village of Euclid v. Ambler Realty Co.*<sup>86</sup> an ordinance was upheld which established a comprehensive and detailed regulation according to six zones which restricted the location of trades, industries, apartment houses, two-family houses, single-family houses, the lot areas to be built upon, the height of buildings, etc.

The court pointed out that the validity of such zoning would depend upon the circumstances of each case, that what might be reasonable and therefore valid as applied to great cities might be unreasonable and therefore invalid as applied to smaller urban centers. In the instant case the court found the restrictions reasonable from a police point of view. After referring to and classifying the State cases in which zoning ordinances had been sustained or declared invalid, the court declared that there was evidence of a decided trend of opinion toward the broader view as to the validity of such ordinances. The opinion continued: "The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are

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<sup>85</sup> 214 U. S. 91.

<sup>86</sup> 272 U. S. 365.

promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on."

In *Zahn v. Board of Public Works of Los Angeles*<sup>87</sup> the ruling of the *Euclid Village* case was reaffirmed.

### § 1191. Building Lines May Be Fixed.

In *Gorieb v. Fox*<sup>88</sup> it was held that forbidding owners of property bordering on a public street to construct buildings nearer than a specified distance from the street line was not a denial to them of due process of law; nor was there a denial of the equal protection of the laws by reason of the provision that, for good reasons, exceptions as to certain buildings might be made. Should this discretionary right to make exceptions be abused, the court would then, and not until then, take cognizance of abuse. Referring to the case of *Euclid v. Ambler*, the court said: "After full consideration of the conflicting decisions, we recently have held, that comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution. It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable. . . .

"The property here involved forms part of a residential district within

<sup>87</sup> 274 U. S. 325.

<sup>88</sup> 274 U. S. 603.



which, it is fair to assume, permission to erect business buildings is the exception and not the rule. The members of the city council, as a basis for the ordinance, set forth in their answer that front-yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles. We cannot deny the existence of these grounds—indeed, they seem obvious. Other grounds, of like tendency, have been suggested. The highest court of the State, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong, a conclusion which, upon the record before us, it is impossible for us to reach.”

The court then pointed out the distinction between the instant case and that of *Eubank v. Richmond*<sup>89</sup> in which had been held unconstitutional a municipal ordinance which required the Committee on Streets, upon request of the owners of two-thirds of the abutting property, to establish a building line on the side of the square on which such property abutted, not less than five nor more than thirty feet from the street line. The court in *Gorieb v. Fox*, referring to this case, pointed out that the ordinance in that case required the Committee on Streets to fix the building line upon request of two-thirds of the property owners, and thus left to that Committee no discretion. As said by the court in that case: “In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use, but the kind of use, which another set of owners may make of their property.”

In *Nectow v. City of Cambridge*<sup>89a</sup> it was held that the inclusion of private land within a residential district in a zoned district with the result that its use for business or industrial purposes caused such a damage to its owner as to deprive him of property without due process of law. The court found, from the facts of the case, that the zoning ordinance in question could not be defended as a police measure.

In *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*<sup>89b</sup> it was held that a zoning ordinance was unconstitutional insofar as it gave to an official of the city what amounted to an arbitrary right to refuse to

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<sup>89</sup> 226 U. S. 137.

<sup>89a</sup> 277 U. S. 133.

grant a permit for the erection of a building within a zone. The refusal to grant the permit in this case had been based upon the ground that the petitioner for it had failed to show that he had obtained the consent of other property owners as provided for by the ordinance. The court, however, found that there was nothing in the record to show that the proposed building, if erected and maintained for the purposes proposed—a home for the aged poor—would work injury, inconvenience or annoyance to the community, the district or to any person. The case was thus distinguishable from *Cusack Co. v. City of Chicago*.<sup>89c</sup> The fact, that the ordinance provided that, the consent of other property owners being obtained, buildings of the class of the one in question might be permitted, showed, said the court, that the exclusion of such a building was not, by its very nature, indispensable to the general zoning plan. "We need not decide," the court said, "whether, consistently with the Fourteenth Amendment, it was within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration."

#### § 1192. Rents: Regulation of.

An illustration of the extreme extent to which the States in the exercise of their police powers may, under certain circumstances, regulate private proprietary rights is that exhibited in *Block v. Hirsh*,<sup>90</sup> *Levy Leasing Co. v. Siegel*,<sup>91</sup> *Marcus Brown Holding Co. v. Feldman*,<sup>92</sup> and *Chastleton Corporation v. Sinclair*<sup>93</sup> with reference to the limitation of rents.

In the first of these cases the court upheld a section of an act of Congress of 1919<sup>94</sup> for the District of Columbia which declared that, because of exigencies growing out of the World War, rental conditions in the District had become dangerous to the public health and burdensome to public officers, employees, and accessories, and was thereby embarrassing the Federal Government in the transaction of the public business, and that, this being so, declared the right of a tenant to remain in possession of rented quarters after the expiration of their leases on payment of the rent, or performance of other conditions fixed by their leases, unless such rent should be modified by a Commission established by the Act. The court declared that the public exigency had operated, for the time being at least, to clothe the business of renting residences in the District with a public interest, and, therefore, that it might be regulated to the extent to which that interest might require. The court pointed out that the Act provided machinery for securing reasonable rents to landlords, but conceded that it might be assumed that the interpretation of "reasonable"

<sup>89c</sup> 242 U. S. 526.

<sup>90</sup> 256 U. S. 135.

<sup>91</sup> 258 U. S. 242.

<sup>92</sup> 256 U. S. 170.

<sup>93</sup> 264 U. S. 543.

<sup>94</sup> 41 Stat. at L. 298.

would deprive them in part at least of the power of profiting by the sudden influx of people to Washington City by reason of the war, and thus deprive them of a right usually incident to the ownership of favorably situated private property. "But," said the court, "while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws. The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail." <sup>95</sup>

In *Marcus Brown Holding Co. v. Feldman* <sup>96</sup> a law of 1920 of the State of New York was upheld which prohibited, until November 1, 1922, actions to recover possession of real property occupied for dwelling purposes in a city of one million inhabitants or more, except upon certain grounds. The case was held to be governed by that of *Block v. Hirsh*, and the law held to be not unconstitutionally discriminatory because of the exclusion from its provisions of buildings occupied for business purposes, of hotels, and buildings in course of erection.

In *Levy Leasing Co. v. Siegel* <sup>97</sup> the doctrine of *Marcus Brown Holding Co. v. Feldman* was reaffirmed.

In *Chastleman Corporation v. Sinclair* <sup>98</sup> it was declared that a police legislation justified as an emergency measure, would cease to be constitutional in its operation after that emergency has passed, and that whether

<sup>95</sup> Four justices dissented. "If," they said, "such exercise of government be legal, what exercise of government is illegal? Houses are a necessary of life, but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the Government? . . . If the public interest may be concerned, as in the statute under review, with the control of any form of property, it can be concerned with the control of all forms of property. And, certainly, in the first instance, the necessity or expediency of control must be a matter of legislative judgment. . . . If the public interest can extend a lease it can compel a lease; the difference is only in degree and boldness. . . . The prospect expands and dismays us when we pass outside of conditions applicable to the local and narrow conditions in the District of Columbia. . . . It is manifest . . . that, by the statute the Government interposes with its power to annul the covenants of a contract between two of its citizens and to transfer the uses of the property of one and vest them in the other. The interposition of a commission is but a detail in the power exerted—not extenuating it in any legal sense. Indeed, intensifies its illegality, takes away the right to a jury trial from any dispute of fact."

The dissenting justices then went on to show that there was no analogy between the instant case and those in which the regulation of insurance rates, or those of public utilities, had been held justified, nor to those in which the height of buildings in business sections of a city has been held subject to limitation.

<sup>96</sup> 256 U. S. 170.

<sup>97</sup> 253 U. S. 242.

<sup>98</sup> 264 U. S. 543.

the rent act of Congress with reference to the District of Columbia should no longer be enforced would depend upon the facts that might be adduced. These facts, the court said, could, in the instant case, be most conveniently examined and weighed in the Supreme Court of the District of Columbia.

### § 1193. Inequality of Bargaining Power.

Much of the legislation which had been involved in the cases which have been examined has by some been sought to be maintained as constitutional upon the ground that, where there is a substantial inequality in the bargaining power of parties to an agreement, and especially to a labor agreement, the legislature is constitutionally justified in interposing its control in modes, and to an extent, needed to correct this inequality. Attractive as it may appear from the standpoint of social justice, and as promotive of the general material welfare if intelligently exercised, such a legislative right, if recognized, would, it is clear, open up private rights to governmental regulation to an extent that would not fall far short of that desired by socialists or even of communists of the extreme type. The courts generally, and the Supreme Court of the United States in particular, have recognized this and have refused to accept the doctrine as a constitutional justification for the exercise of legislative control of private rights. Thus, in *Coppage v. Kansas*,<sup>99</sup> in which, as has been earlier pointed out, the court held unconstitutional a State statute which sought to forbid employers to require of their employees or those seeking to become such, an undertaking not to become or to remain members of a labor organization, the court said: "As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that 'employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof.' No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to hold

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<sup>99</sup> 236 U. S. 1.

freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment, in declaring that a State shall not 'deprive any person of life, liberty, or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the States from any unwarranted interference with either.

"And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

The matter of the constitutionality of legislative measures which have for their purpose and alleged justification the shifting of economic burdens from the shoulders of those upon whom they fall by reason of the operation of the ordinary competitive processes in modern industrial and commercial society to the shoulders of other persons more favorably affected by such processes, will receive further consideration in the chapter dealing with Employers' Liability and Workmen's Compensation Acts.<sup>100</sup>

It would seem, however, where social inequality leads, or tends to lead to real poverty, which may promote vice or crime, the State is entitled to intervene. Thus, in *New York Central R. Co. v. White*,<sup>101</sup> discussing the extent of the "police power" of the State, with reference to workmen's compensation acts, we find the court saying: "One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime." This matter also is touched upon in the section dealing with State pensions.<sup>102</sup>

#### § 1194. Due Process of Law and *Æsthetics*.

Although it has been held that, under its police power, the State may protect its people against undertakings which are offensive to their sense of smell or to their hearing, it has been held that it may not thus protect them against objects or representations which are unsightly, except in so far as such objects or representations may be of an immoral or indecent character.<sup>103</sup> The reasons for this discrimination would appear to be in part a

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<sup>100</sup> Chapter XCVIII.

<sup>101</sup> 243 U. S. 188.

<sup>102</sup> See § 1151.

<sup>103</sup> *State v. Whitlock* (149 N. C. 542); *Hatter Sign Co. v. Physical Culture School* (249 Ill. 436).

lack of conviction on the part of the courts that ugliness can be so disagreeable or painful to the individual that he needs to be protected against it, and, in part, and perhaps principally, to the fact that the æsthetic sensibilities of individuals are so subjective in character and, therefore, so varying, that it is not practicable for the legislatures or for the courts to determine concretely and specifically what objects or representations are sufficiently unsightly, or deemed such by a sufficient generality of people, to justify the prohibition of their presentation to the public eye. It is, however, to be observed that there are instances in which the courts would appear to have been strengthened in their disposition to sustain legislative or administrative regulations upon grounds of morals or public safety by reason of the fact that the structures in question have also been indubitably of an unsightly character. So also with regard to the sustaining of so-called "zoning" laws there is ground for saying that æsthetic considerations have not been absent. However, there are practically no cases, State or Federal, in which the control of the use of private property under the police power has been sustained by the courts solely and expressly upon the ground that the prohibited structures or representations would be disagreeable or painful to the æsthetic sense of the public.

It may be observed that the use of the right of eminent domain for the purpose of provision of parks or the erection of monuments, or other structures for beautifying cities, towns, etc., has been frequently exercised without constitutional objection by the courts.<sup>104</sup> Closely connected also with the æsthetic value of such monuments, etc., has been their influence in stimulating patriotism, which influence the courts have held to furnish a legitimate ground for public expenditures.<sup>105</sup> The æsthetic motive in the provision of public parks and national reservations has of course been present, and, in some cases, undoubtedly dominant, but the courts have been able to justify them on the safer constitutional ground of their promotion of the public health by providing "breathing spaces" and opportunities for recreation. So, also, with regard to regulations of the height of buildings the courts have been able to sustain them upon grounds of public safety or health, although the moving consideration for their enactment or issuance has, in no small part, been an æsthetic one.<sup>106</sup>

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<sup>104</sup> See the article "Municipal Æsthetics and the Law" by N. F. Baker, in 20 *Illinois Law Review*, 546.

<sup>105</sup> In *United States v. Gettysburg Electric R. Co.* (160 U. S. 668), the court said: "Any act of Congress which plainly and directly tends to enhance the respect and love of the citizens for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers of Congress must be valid."

<sup>106</sup> In *Welsh v. Swasey* (193 Mass. 364), we find the Supreme Court of Massachusetts saying: "The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light, and air, and thus affect

### § 1195. Billboards.

The legitimacy of the exercise of police powers for æsthetic purposes has been frequently invoked to sustain municipal ordinances regarding billboards. These structures, when upon private property have been held subject to regulation only when the courts have been able to find some justification from the standpoints of morals, or protection against fires, or public safety. In *Haller Sign Co. v. Physical Culture Training School* <sup>107</sup> the court, holding invalid a statute prohibiting the erection of structures for advertising purposes within five hundred feet of any public park or boulevard, said: "However desirable it may be to encourage an appreciation of the beautiful in art, and to cultivate the taste of the people of the State, still it has never been the theory of our Government that such matters could properly be enforced by statute, when not connected with the safety, comfort, health, morals and material welfare of the people. Advancement along these lines, whether wisely or unwisely, has, so far, been left to the schools and colleges and the influence of social intercourse." <sup>108</sup>

In *Thomas Cusack Co. v. Chicago* <sup>109</sup> was held valid a municipal ordinance which forbade the erection of any billboard or signboard over twelve square feet in area in any city block in Chicago in which one-half of the building on both sides of the street was used exclusively for residence purposes, without first obtaining the written consent of the owners of a majority of the frontage on both sides of the street in such block. The State court had upheld this ordinance as a reasonable police regulation against fire, against offensive and unsanitary accumulations, and the furnishing of opportunity for immoral practices and the gathering of loiterers and criminals. The Federal Supreme Court held that there was nothing so unreasonable in such a holding as to justify it in opposing its own judgment of fact to that of the State authorities.

### § 1196. Obligation of Contracts and Due Process of Law.

No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. That government is, however, forbidden by the Fifth Amendment to de-

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the public health. It may also increase the danger to persons and property from fire and be a subject for legislation on that ground."

Upon appeal to the Supreme Court of the United States, the holding of the Massachusetts court in this case was affirmed. The law upheld in the case was one which limited the maximum height of buildings in the commercial district of Boston to 125 feet, and in residential districts to from 80 to 100 feet.

<sup>107</sup> 249 Ill. 436.

<sup>108</sup> See also *Commonwealth v. Boston Advertisement Co.* (188 Mass. 348); *Bryan v. Chester* (212 Penna. 259); *Bill Posting Sign Co. v. Atlantic City* (71 N. J. L. 72). See other cases cited by Mr. Baker in the article "Municipal Æsthetics and the Law," 20 *Illinois Law Review*, 546.

<sup>109</sup> 242 U. S. 526.

prive persons of property without due process of law or to take private property for a public use without just compensation. In so far, then, as contract rights may be treated as property they are protected from direct impairment by Federal action. This was definitely declared, as we have earlier seen in the first legal tender decision of *Hepburn v. Griswold*.<sup>110</sup>

Contracts are not, however, protected from an indirect impairment of their obligation when this incidentally results from the exercise by Congress of a legislative power constitutionally given to it. Thus in *Knox v. Lee*<sup>111</sup> in which, reversing the opinion in *Hepburn v. Griswold*, it was held that, under its power to carry on war and to maintain its own existence, the Federal Government might authorize the issuance of legal tender notes valid in payment of debts previously contracted,<sup>112</sup> the court denied that the obligation of contracts was thereby impaired; but they went on to say, even if it were held that the obligation of contracts was thereby impaired, that would not be constitutionally objectionable.

"Nor can it be truly asserted," the opinion declared, "that Congress may not, by its action, indirectly impair the obligation of contracts if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly by passing a Bankrupt Act, embracing past as well as future transactions. . . . So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or even in peace pass non-intercourse acts, or direct an embargo."

With reference to the due process of law requirement of the Fifth Amendment, the court said: "That provision has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has not been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft or a war, may inevitably bring upon individuals great losses, may indeed render valuable property almost valueless. They may destroy the worth of contracts." But such laws, of course, are not, therefore, void.

In the *Sinking Fund* cases,<sup>113</sup> it was declared: "The United States cannot any more than a State interfere with private rights except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law."

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<sup>110</sup> 8 Wall. 603.

<sup>111</sup> 12 Wall. 457.

<sup>112</sup> In a still later case, *Juilliard v. Greenman* (110 U. S. 421), it was held that the power to issue legal tender notes is implied in the power to borrow money, as well as from other express powers, and, therefore, may be exercised in times of peace as well as of war.

<sup>113</sup> 99 U. S. 700.



## CHAPTER XCVI

### DUE PROCESS OF LAW AND PERSONAL LIBERTY: THE FREEDOM TO CONTRACT: WAGE CONTRACTS

#### § 1197. Liberty Defined.

In further protection of the substantive rights of individuals against public regulation the courts have developed a broad conception of "liberty" which makes it include not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into contractual relations. So far as the use of one's private property is concerned, the right is viewed as also a property right as has earlier appeared. So far as the right to enter into contracts is concerned, it also is sometimes viewed as a property right, but more often as included within the broadened conception of liberty.

In *Allgeyer v. Louisiana* <sup>1</sup> the court, defining liberty, said: "The liberty mentioned in the Fourteenth Amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned. In the privilege of pursuing an ordinary calling or trade, or of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

With this definition of liberty may be compared the following definition, by the Supreme Court of Illinois, of property as including the idea of liberty as well. "The right of property, preserved by the Constitution," said the court, "is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." <sup>2</sup>

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<sup>1</sup> 165 U. S. 578.

<sup>2</sup> See *Braceville Coal Co. v. People* (147 Ill. 66). Cf. *McGehee, Due Process of Law*, p. 141.

In *Meyer v. Nebraska* <sup>3</sup> the court said: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

### § 1198. Personal Liberty: Compulsory Vaccination.

In *Jacobson v. Massachusetts* <sup>4</sup> it was strenuously contested that a State law which required citizens to submit themselves to anti-smallpox vaccination was an unconstitutional violation of their personal liberty—that such compulsion was nothing short of an authorized assault upon their persons. The Supreme Court, however, upheld the law, saying: "The liberty secured by the Constitution of the United States within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." <sup>5</sup>

The court declared that the law in question was a sanitary law and pointed out that the vaccination was to be required only when, in the opinion of the local health authorities, the public health or safety demanded it.

### § 1199. Sterilization.

In a number of States laws have been passed for the sterilization of certain classes of criminals and of insane and feeble-minded persons. In *Buck v. Bell* <sup>6</sup> one of these laws relating to the sterilization of feeble-minded persons was upheld by the Supreme Court as a reasonable police measure. The court said: "The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the

<sup>3</sup> 262 U. S. 390.

<sup>4</sup> 197 U. S. 11.

<sup>5</sup> This last sentence is quoted from the opinion in *Crowley v. Christensen* (137 U. S. 86), a case in which it was held that no one has an inherent right to sell intoxicating liquors at retail, and that such retail selling may be regulated or even wholly forbidden by the State.

<sup>6</sup> 274 U. S. 200.

order. In view of the general declarations of the legislature and the specific findings of the court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."

### § 1200. The Right Not to Work.

The question whether, included within the constitutional right to liberty is a freedom from compulsion by law to engage in some occupation or work useful to society or the State was raised during the World War when, in some of the States of the Union, laws were passed imposing this requirement and penalizing its violation. It seems clear that such laws are unconstitutional except when justified as war measures. And it would seem that when, as was the case in the World War, the contesting States are compelled to draw to their military support practically the entire economic, industrial and commercial services of their people, matters of food and other material supplies become of prime importance. This being so, it would seem that, just as men may be drafted into active military service, so they may, for military reasons, be drafted into supply services back of the military lines; and, if it becomes necessary to obtain the aid to this end of all persons capable of productive or useful labor, this may be legally required either by way of formally drafting them and assigning them to specific services, or by requiring that they shall engage in some useful or productive service, leaving it to each individual to select what occupation or profession he will enter, but without the option not to enter any such profession or occupation.<sup>7</sup>

As has been elsewhere pointed out, it has been held that, in time of war, the States of the Union may, in aid of the Federal Government, exercise what may perhaps be called war powers.<sup>8</sup>

### § 1201. Liberty of Teaching.

In *Meyer v. Nebraska*<sup>9</sup> the court held unconstitutional a State law which prohibited the teaching of any subject in any language other than English in any school, public or private, within the State, or the teaching

<sup>7</sup> See the interesting paper by W. F. Keefer, "Has a Person a Constitutional Right to Abstain from Work?" in 29 *West Virginia Law Quarterly*, 20.

<sup>8</sup> See § 1037.

<sup>9</sup> 262 U. S. 390.

of any language other than that of English in any class below the eighth grade. The law had been sought to be constitutionally defended as one to promote civic development by prohibiting training and education of the young in foreign tongues and ideals before they had learned English and acquired American ideals, and that it was a valid public policy that the English language should become the mother tongue of all the children reared in the State. To this the Supreme Court replied that the American people had always regarded education as a matter of supreme importance and that, included within the natural right of parents to control their children, was their right to give them an education suitable to their station in life; and also, that the calling or profession of teaching was regarded as a useful and honorable one, and indeed, essential to the public welfare. The court continued: "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this, cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means. . . . The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquillity has been shown."<sup>10</sup>

The court called attention to the fact that, in the instant case, there was not called into question the right of States to control the instruction that should be given in the schools established and maintained by itself.

In *Pierce v. Society of the Sisters*<sup>11</sup> suit was brought by the defendants in error against the Governor of the State of Oregon to enjoin the enforcement of a State Compulsory Education Act which required every parent, guardian, or other person having control or charge of children between eight and sixteen years of age to send them to the public schools. The defendants in error who maintained private schools and

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<sup>10</sup> It would appear from this last sentence that the court did not wish to deny the possibility that, in time of war, or even of great dissension and disturbance in time of peace, legislation of the character involved in the instant case, might be constitutionally justified.

<sup>11</sup> 268 U. S. 510.

had property devoted to that use, and from such schools derived a considerable income, declared, therefore, that, by the enforcement of the act, they would be substantially injured. Under authority of the doctrine declared in *Meyer v. Nebraska*<sup>12</sup> the court held the act unconstitutional as an unreasonable interference with the liberty of parents and guardians to direct the upbringing and education of the children under their control, saying: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

As to the rights of the defendants in error in the premises, the court said: "Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate within the rule approved in *Truax v. Raich*,<sup>13</sup> *Truax v. Corrigan*<sup>14</sup> and *Terrace v. Thompson*<sup>15</sup> and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."

### § 1202. Common-Law Limitations upon Contractual Freedom.

Aside from limitations upon the right or power to enter into legally binding contracts due to status, as, for example, infancy, lunacy, etc., there are common-law limitations which exist with reference to contracts which are deemed to be opposed to public policy because regarded as immoral or as prejudicial to the public welfare. Instances of such contracts or agreements are those in restraint of trade or of competition or which tend to create monopolies, wagering or betting contracts, contracts in restraint or discouragement of marriage, agreements which amount to seditious or otherwise criminal conspiracies, agreements to interfere with or bring improper influences to bear upon the administration of justice by the courts, or to influence legislation (lobbying), etc. In some cases these contracts, and others of like nature, are held to be void or voidable; in other cases, the entering into them has been, or still is, held to constitute a criminal act. All such limitations upon contractual

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<sup>12</sup> 262 U. S. 390.

<sup>13</sup> 239 U. S. 33.

<sup>14</sup> 257 U. S. 312.

<sup>15</sup> 263 U. S. 197.

liberty are deemed constitutional either as common-law limitations, or, when imposed by statute, as proper police measures. During comparatively recent years, however, there has been much legislation, both State and Federal, which has sought to regulate the contracts between employers and employees as regards either the form or time of wage payments and as to their amount, and their constitutionality has been attacked upon the ground that they are in violation of the requirement with regard to due process of law. Because of its importance this subject will be specifically treated in the sections which follow.

### § 1203. Labor Contracts: Hours of Labor of Women.

Compulsory labor is treated in the chapter dealing with the Thirteenth Amendment.

The limitation by statute of the hours that one may labor, or contract to labor, so far as they relate to women and children, when reasonable in character, have been sustained as police measures for the protection of the health of the laborers, or, in the case of women, of their children also. This position was not reached, however, without some dissent upon the part of the courts. Thus, in 1895, in *Ritchie v. Illinois*<sup>16</sup> the court held unconstitutional a State law fixing an eight-hour labor day for women, upon the ground that it was a "purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties."

However, in *Müller v. Oregon*,<sup>17</sup> decided in 1908, the Supreme Court sustained a State law limiting the labor of women in laundries to ten hours a day, upon the ground (of which the court said that it was entitled to take judicial knowledge), that women's physical structure and the functions which she performs justify special legislative protection as against labor injurious to her health.<sup>18</sup>

In *Ritchie v. Wayman*,<sup>19</sup> decided in 1910, the Illinois court, which fifteen years before had held void the eight-hour law for women, upheld a ten-hour law for women, thus following the holding of the United States Supreme Court in *Müller v. Oregon*.

In *Riley v. Massachusetts*,<sup>20</sup> decided in 1914, the Supreme Court again upheld a State ten-hour law (or more than fifty-six hours a week) for women.

From this time on there has been no doubt as to the constitutionality of statutes limiting, to a reasonable amount, the hours that women may work. The only question has been as to the matter of the laws' reasonableness. In *Miller v. Wilson*<sup>21</sup> a State law was upheld which limited

<sup>16</sup> 155 Ill. 98.

<sup>17</sup> 208 U. S. 412.

<sup>18</sup> Prior to this the courts in several of the States had upheld statutes limiting the hours of labor of women.

<sup>19</sup> 244 Ill. 509.

<sup>20</sup> 232 U. S. 671.

<sup>21</sup> 236 U. S. 373.

the hours of labor of women in certain specified establishments to eight hours a day or forty-eight hours in one week. The court, however, said: "This is not to imply that a limitation of the hours of labor of women might not be pushed to a wholly indefensible extreme."<sup>22</sup>

#### § 1204. Hours of Labor in Dangerous Employments.

It is established that the hours of labor, irrespective of age or sex may be limited in dangerous employments, or under other circumstances, where it sufficiently appears that such limitation will tend to prevent accidents or sickness or undue physical exhaustion of the workers. The leading case upon this point is *Holden v. Hardy*.<sup>23</sup> In that case the court said: "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has adjudged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

#### § 1205. Hours of Labor of Adult Males.

It is established that, as regards laborers employed by itself or upon its own public works, the States or the National Government may regulate at will the hours of labor. In *Atkin v. Kansas* <sup>24</sup> this doctrine was declared. The court said: "Whatever may have been the motives controlling the enactment in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours a day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them."<sup>25</sup>

*Lochner v. New York* <sup>26</sup> decided in 1905, is a leading case as to the right of a State to control adult male laborers in private employments. In that case was held invalid a State law which sought to limit to sixty hours a week and ten hours a day the labor of workmen in bakeries. The court was unable to find that the operation of bakeries was one which, because

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<sup>22</sup> See also *Bosley v. McLaughlin* (236 U. S. 385), decided at the same time.

<sup>23</sup> 169 U. S. 366.

<sup>24</sup> 191 U. S. 207.

<sup>25</sup> In *Heim v. McCall* (239 U. S. 175) and *Crane v. New York* (239 U. S. 195) was further illustrated the extent of the power of a State or of the United States to regulate employment upon its own public works, it being held in these cases that a statute was constitutional which limited such employment to citizens of the United States, although, in *Truax v. Raich* (239 U. S. 33) it had been held that this restriction might not be imposed upon employers of labor upon private works.

<sup>26</sup> 198 U. S. 45.

of its character, would justify such police control as had been found to exist in mining in *Holden v. Hardy*,<sup>27</sup> and, lacking this justification, deemed the restriction upon the power of the employers and employees to enter into labor contracts an arbitrary interference with their liberty and therefore a denial of due process of law. The court said: "The right to purchase or to sell labor is part of the liberty protected by this (Fourteenth) Amendment, unless there are circumstances which exclude the right. . . .

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of a free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but 10 hours per day or only 60 hours a week. The limitation of the hours of labor does not come within the police power on that ground.

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

This decision, since the time it was rendered, has given rise to much adverse comment. The criticism, however, has been not to the general doctrine declared but to the substitution by the Supreme Court of its judgment for that of the legislature of the State of New York that there were no elements present in the bakery business which would justify an exercise of the State's police power.

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<sup>27</sup> 169 U. S. 366.



In *Bunting v. Oregon*,<sup>28</sup> the Supreme Court upheld a State law which provided that: "No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in cases of emergency, when life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditional that payment be made for such overtime at the rate of time and one-half of the regular wage."

Here the court found no reason in the record for denying the contention that the law was intended as a police measure for the preservation or protection of the health of the employees, and that it would have that effect. The court also refused to accept the contention that, by providing for extra pay for overtime, the law was one for the fixing of wages. "Apparently," said the court, quoting the Supreme Court of the State, "the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime."

#### § 1206. Minimum Wage Laws.

Although the economic expediency of fixing by law the minimum wages that may be legally paid to employees has been much disputed, such laws have been passed in a considerable number of States with respect to women and children or to specific employments which are peculiarly susceptible to "sweatshop" methods. Against the constitutionality of all such laws it has been urged that they do not seek, except remotely, any legitimate police end such as the protection of the health or morals of the employees, but rather that they aim to correct, from the standpoint of social justice, the distribution of economic goods which results from the operation of free competitive forces. In this respect, it has been urged, they are similar to laws which would attempt to fix or limit the prices at which commodities may be sold.

In *Stettler v. O'Hara*<sup>29</sup> and *Simpson v. O'Hara*,<sup>30</sup> a State law was held constitutional by the Supreme Court of Oregon which was entitled "An Act to protect the lives and morals of women and minor workers, and to establish an industrial welfare commission and define its powers and duties, and to provide for the fixing of minimum wages and maximum hours and standard conditions of labor for such workers, and to provide penalties for the violation of this Act." In its preamble the law recited that the welfare of the State of Oregon required that women and children should be protected against conditions of labor which have a pernicious effect upon their health and morals, and that inadequate wages, as well as unduly long hours and unsanitary conditions of the establishments

<sup>28</sup> 243 U. S. 426.

<sup>29</sup> 69 Or. 519.

<sup>30</sup> 70 Or. 261.

in which they work, have this pernicious effect. In the body of the act it was provided, *inter alia*, that it should be unlawful to employ women or minors in any occupation within the State for unreasonably low wages, and that it should be within the power and duty of the Industrial Commission (provided for in the act) to determine when this prohibition was being violated and to issue an order correcting such violation. In pursuance of this authority the Commission, in the instant case, had issued an order fixing the minimum rate of wages that might be paid to adult women workers in the establishment of the complainant Stettler. The Oregon Supreme Court, in upholding the validity of this order, declared that common "belief" and "common knowledge" made it indubitable that the employment of female labor as it had been carried on in the past had been detrimental to public morals and had had a strong tendency to corrupt the women employees. The court, quoting with approval a report of the Massachusetts Commission of Minimum Wage Boards, made in 1912, continued: "' Women in general are working because of dire necessity, and in most cases the combined income of the family is not more than adequate to meet the family's cost of living. In these cases it is not optional with the woman to decline low-paid employment. Every dollar added to the family income is needed to lighten the burden which the rest are carrying. . . . Wherever the wages of such a woman are less than the cost of living and the reasonable provision for maintaining the worker in health, the industry employing her is in receipt of the working energy of a human being at less than its cost, and to that extent is parasitic. The balance must be made up in some way. It is generally paid by the industry employing the father. It is sometimes paid in part by future inefficiency on the part of the worker herself, and by her children, and perhaps in part ultimately by charity and the State. . . . If an industry is permanently dependent for its existence on underpaid labor, its value to the Commonwealth is questionable.' With this common belief, of which Mr. Justice Harlan says 'we take judicial notice,' the court can not say, beyond all question, that the act is a plain, palpable invasion of rights secured by the fundamental law, and has no real or substantial relation to the protection of public health, the public morals, or public welfare."

Upon appeal to the Supreme Court of the United States, this decision was affirmed by an evenly divided court, without opinion filed.<sup>31</sup> The case, therefore, furnished no authoritative guidance as to what would be the position of the court with regard to the constitutionality of minimum wage legislation. This statement of the court's position was, however, made in the case of *Adkins v. Children's Hospital*<sup>32</sup> in which the court declared invalid an act of Congress which authorized a commission,

<sup>31</sup> 243 U. S. 629.

<sup>32</sup> 261 U. S. 525.

thereby created, to fix standards of minimum wages for women in any occupation in the District of Columbia, and to declare what wages should be deemed inadequate to supply the necessary cost of living to any such women in order to maintain them in good health and to protect their morals, and also to ascertain and declare standards of minimum wages for minors and what wages should be deemed unreasonably low for such minors. Violations by employers of the standards and wages thus declared were made misdemeanors punishable by fine and imprisonment. The instant case was an action by the appellee to restrain the commission from enforcing or attempting to enforce its order with reference to women adult employees. The court, in its opinion, after citing and quoting from its opinions in *Adair v. United States*<sup>33</sup> and *Coppage v. United States*<sup>34</sup> to the effect that a person has the constitutional right to sell his or her labor upon such terms as he or she deems proper. and that the employer has a corresponding right to contract for such labor, pointed out that these rights are not absolute in character, but are subject to limitation in their exercise to reasonable police regulations, and that, under certain circumstances, as, for example, in special industries, such as mining, or public employments, or where women or children are concerned, this police regulation may extend to the fixing of minimum hours of labor, or, in the case of public service like railways where the public is involved to the extent to which it was when the Adamson Act was enacted, to the regulation for a limited time of wages. But, said the court, the law involved in the instant case could not be brought within the rule of such cases. The laws sustained in those cases, the court declared, had no necessary effect upon the heart of the labor contract, that is, the amount of wages to be paid or received,—they dealt only with incidents of the employment. “A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalizes whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages.” Limitations upon the hours of employment, said the court, had never been sustained except in respect of those occupations where the work if long continued is detrimental to health, and therefore, the sustaining of such laws furnished no justification by way of analogy for sustaining the instant law in limitation of the wages to be paid or received. “It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply

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<sup>33</sup> 208 U. S. 161<sup>34</sup> 236 U. S. 1.

and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment, and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.”

Furthermore, as the court went on to point out, the standard furnished by the statute for the guidance of the board was so vague as to be impossible of practical application with any reasonable degree of accuracy. “What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so.”

Also, said the court, the law took account of only one party to the contract. “It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employer is capable of earning it, but irrespective of the ability of his business to sustain the burden. . . . To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and, therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.”

Finally, said the court, “The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract for the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker,

man or woman, to a living wage may be conceded, . . . but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. . . . In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities."

Chief Justice Taft and Justice Holmes dissented.<sup>35</sup> To them the law appeared to have a direct relation to the health and morals of the women, and, as such, to be justified as a police regulation. The Chief Justice said that the majority had exaggerated the importance of the wages element in the labor contract, and thus unjustifiably rendered it more inviolate from regulation than the other elements of the contract. Justice Holmes also took the same ground when he said: "I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work."

Reduced to its lowest and most precise terms, the decision turned upon the point whether or not there could be seen a direct relation between low wages of women and their health or morals. The Congress which enacted the law, and the dissenting justices, were convinced that there was such a relation. The majority of the court could perceive no such relation.

#### § 1207. Wages: Character, Methods and Times of Payment.

Under the police power, the government may regulate, in a reasonable manner, for purposes of protection against fraud, or for other public welfare ends, the character, methods and times of payment of wages. Thus, in *McLean v. Arkansas* <sup>36</sup> a State statute was sustained which required coal to be measured before screening for payment of miners' wages; in *Knoxville Iron Co. v. Harbison*,<sup>37</sup> a State law was sustained which required the redemption in cash of store orders issued in payment of wages;

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<sup>35</sup> Justice Brandeis took no part in the consideration or decision of the case.

<sup>36</sup> 211 U. S. 539.

<sup>37</sup> 183 U. S. 13.

in *Erie Railway Co. v. Williams*,<sup>38</sup> a State statute was sustained which regulated the time within which wages should be paid to employees in certain specified industries.

### § 1208. Laws Regulating the Employment and Discharge of Workmen.

In *Coppage v. Kansas* <sup>39</sup> the court held invalid a State law which forbade an employer to require of one seeking employment that he would not become or remain a member of a trade-union. Before this, in *Adair v. United States* <sup>40</sup> it had held that Congress could not constitutionally forbid an interstate railroad from discharging an employee solely because of his affiliation with a trade-union.<sup>41</sup>

The law in the *Coppage* case provided: "Section 1. That it shall be unlawful for any individual or member of any firm, or an agent, officer, or employee of any company or corporation, to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation."

Violation of this provision was declared a misdemeanor punishable by fine or imprisonment. In the instant case an employee had refused to withdraw from a labor organization and had thereupon been discharged, and the company thus discharging him had been found guilty under the law and adjudged to pay a fine with imprisonment as an alternative. The Supreme Court, with reference to the unconstitutionality of the law under which this conviction had been secured, declared itself controlled by its decision in the *Adair* case, and declared that there was no essential distinction between the right of an employer to discharge an employee because of his membership in a trade-union, and the right of the employer to give to an employee the option of surrendering his membership and remaining in his employment or of retaining such membership and being dismissed from his employment.<sup>42</sup> Restating the doctrine involved in

<sup>38</sup> 233 U. S. 685.

<sup>39</sup> 236 U. S. 1.

<sup>40</sup> 208 U. S. 161.

<sup>41</sup> See *ante*, § 481, for a discussion of this case.

<sup>42</sup> Justices Day and Hughes, dissenting, found an essential distinction between the right of an employer to terminate relations of employment, as involved in the *Adair* case, and the right to impose conditions upon another as a prerequisite to employment. He said: "It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law, or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the state."

Justice Holmes dissented on grounds which, he said, he had stated in earlier cases.

both cases, the court asserted: "Included in the right of personal liberty and the right of personal property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property." This right, the court continued, could be limited only upon legitimate police grounds. "What possible relation," asked the court, "has the residue of the act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any." The labor unions, the court added, are voluntary associations, not public institutions charged by law with any public or governmental duties such as would support, upon grounds of public welfare, legislation for the maintenance of their membership.<sup>43</sup>

In *Prudential Insurance Co. v. Cheek*<sup>44</sup> the Supreme Court upheld as constitutional a State law which required corporations to issue to employees leaving their services, or being discharged from them after more than ninety days of service, a letter stating the character of the services rendered by such employees, the duration thereof, and the true causes of the termination thereof. The court pointed out that the law applied only to corporations, which, being creations of the law, are subject to such qualifications imposed by that law as may reasonably be deemed expedient in order that their activities may not operate to the detriment of the rights of others; and that, as to the requirement in question, it was one enforced by a custom that very generally existed irrespective of legal requirement. As to the inherent quality of the requirement the court said: "It does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon. So far as construed and applied in this case, it does not debar a corporation from dismissing an employee without cause, if such would be its right otherwise, nor from stating that he is dismissed without cause if such be the fact. It does not require that it give a commendatory letter. There is nothing to interfere, even indirectly, with the liberty of the corporation in dealing with its employee, beyond giving him, instead of what formerly was called a 'reference' or 'character,' a brief statement of his service with the company according to the truth, a word of introduction, to be his credentials, where otherwise the opportunity of future employment easily might be barred or impeded.

"That statutes having the same general purpose, though sometimes less moderate provisions, have been adopted in other States, attests a widespread belief in the necessity for such legislation."

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<sup>43</sup> The court pointed out that in five other States acts similar to the one involved in the instant case had been held unconstitutional. *State v. Julow* (129 Mo. 163); *Gillespie v. People* (188 Ill. 176); *State ex rel. Zillmer v. Kneutzbeg* (114 Wis. 530); *People v. Marcus* (185 N. Y. 257); *State ex rel. Smith v. Daniels* (118 Minn. 155).

<sup>44</sup> 259 U. S. 530.

**§ 1209. Wages Contract.**

In *McLean v. Arkansas*,<sup>45</sup> the court upheld a law preventing miners from contracting for wages upon a basis of screened coal instead of the gross weight mined. In its opinion the following liberal language was used with reference to the weight to be given to the legislative judgment as to the propriety, from a police standpoint, of a limitation upon the liberty of contract or the free use of private property: "The legislature being familiar with local conditions is primarily the judge of the necessity for such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no grounds for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power." And, after referring to the conditions disclosed by an investigation of the Industrial Commission, the opinion concluded: "We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity of such laws evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state."

**§ 1210. Insurance Contract.**

In *German Alliance Ins. Co. v. Hale*,<sup>46</sup> a State law was held to be a valid police regulation which provided that the insured might recover, in addition to the actual loss, twenty-five per cent thereof, any stipulation in the contract of insurance to the contrary notwithstanding, from any company connected with a tariff association which fixed rates of insurance.

**§ 1211. Liability Contract.**

Still more important, however, was the case of *C., B. & Q. R. R. Co. v. McGuire*,<sup>47</sup> decided a month later, in which (after a review of the cases construing the freedom of contract as protected by the due process of law requirement) the court upheld a law, defining the liability of railway corporations for injuries resulting from negligence and mismanagement in the operation of their trains, and precluding the companies from setting up as a defence the acceptance by the injured of benefits under a contract of membership in their relief departments. In its opinion the court said: "It is well established that, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent them from being nullified by prohibiting contracts which, by modification or waiver, would alter or impair the obligation imposed. If the legislature may require the use of safety devices, it may prohibit agreements to dis-

<sup>45</sup> 211 U. S. 539.<sup>46</sup> 219 U. S. 307.<sup>47</sup> 219 U. S. 549.



pense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise."

### § 1212. Assignment of Wages.

In *Mutual Loan Co. v. Martell*,<sup>48</sup> a State law was upheld which declared invalid, as against the employer, assignments of, or orders for, wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by a written consent of the wife of the employee. The following language was employed by the court: "In a sense, the police power is but another name for the power of government; and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the state, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it; and this test was applied by the supreme judicial court of Massachusetts in passing on the validity of the statute under review."

In *Knoxville Loan Co. v. Harbison*<sup>49</sup> the court approved a law compelling the cashing by the employer of coal orders when presented by the miner.

### § 1213. Wages of Employees in Interstate Commerce: The Adamson Act.

The Adamson Act of 1916<sup>50</sup> despite its title as one in regulation of the hours of labor, was, in fact, one in regulation of the wages to be paid. The constitutionality of the measure was one which turned not so much upon its police character as upon the special emergency it was intended to meet and the fact that it related to interstate commerce, the regulation of which is expressly placed within the power of Congress. This act is discussed in some detail in another place.<sup>51</sup>

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<sup>48</sup> 222 U. S. 225.

<sup>49</sup> 189 U. S. 13.

<sup>50</sup> 39 Stat. at L. 721.

<sup>51</sup> See § 483.

## CHAPTER XCVII

### DUE PROCESS OF LAW AND LIABILITY WITHOUT FAULT

#### § 1214. Proprietary Rights Subject to Legal Definition and Limitation.

It has been earlier pointed out that, in American constitutional jurisprudence, due process of law not only imposes procedural requirements, but demands that substantive personal and property rights shall not be taken away or impaired (however impeccable the procedure) except when justified by those considerations of general welfare and public policy which have come to be regarded as superior to private interests and as implying limitations upon the very notion of private rights of person and property. These limitations, recognized by the common law, and, indeed, by nearly all developed systems of law, may be grouped under the following heads:

(1) The legislative authority to determine what may be considered as private property. This authority is illustrated in the denial, except by express statutory provision, that individuals can have proprietary rights in human cadavers, in certain living creatures, such as cats, in patents or copyrights, in living human beings (slavery), in public offices, etc. Whether there exists in American law a right to "privacy" has been a matter of considerable dispute and will be later considered. Whether or not individuals have a vested or proprietary interest in established doctrines of the common law has also been considerably discussed, and will be presently considered.

(2) The legislative right to control the transfer of private proprietary rights, as, for example, by regulating bequests and the inheritances of property, and the alienation of lands so as to prevent latifundia, or generally the holding of property in mortmain for the creation of perpetuities, etc.

(3) The right upon the part of the State to take private property under the exercise of the power to tax, or for public purposes under the right of eminent domain, or under the law of escheats, or by way of fines.

(4) The legislative power to control corporations, which, being the creation of States are subject to such limitations upon their right to acquire or hold or use property, or to engage in operations, as may be imposed by the charters granted to them.

(5) The legislative power to regulate occupations or the persons or corporations carrying them on which are known as "public services" or "public utilities."

(6) The legislative power to regulate private undertakings which are deemed to be "affected with a public interest."

(7) The legislative right generally to render illegal or even criminal the entering into of contracts or combinations which are deemed to be immoral or opposed to public policy.

(8) The general right of the State to control the use of, and, in some cases, to destroy private property, when this is reasonably necessary to protect or advance the health, morals, or even convenience of the public, and to guard the public against fraud.

#### § 1215. No Absolute Legal Rights.

The foregoing illustrations by no means exhaust the list of the ways in which private property and personal rights are subject to legal limitation, for the fact is that "absolute" private rights are not known to the law. This is shown by the fact that even life may be taken by the State in execution of its criminal law, or of its civil law when resistance to its execution cannot otherwise be overcome; and, of course, by the enforcement of compulsory military service, the lives of citizens are, in all cases endangered, and, in many cases sacrificed. Thus, also the specially constitutionally protected rights to freedom of speech and press are limited by the laws of slander and libel, and the right to religious liberty, so far as its outward manifestations are concerned, by laws in regulation of public morality and domestic order.

All of the foregoing doctrines have to be borne in mind in considering due process of law as a defence against the impairment by the State of substantive rights of person or of property.

#### § 1216. Due Process and Common-Law Rights.

At the outset is to be stated the fundamental principle earlier referred to that no one has a vested property interest in any rule of law, substantive or procedural; whence it follows that a law which creates a liability where none has previously existed, or removes or modifies a liability which has previously existed, cannot be considered in itself, *per se*, as a taking or abridgment of the liberty or property of the individual. And the same is true, as has been seen, with reference to changes in procedural rights, provided, of course, some satisfactory procedure is provided.

That a legislature should have this power to modify existing law is, of course, imperative in any but an absolutely stationary social and industrial society. As Justice Matthews said, in *Hurtado v. California*,<sup>1</sup> in which case was upheld a State law which substituted by information for indictment by a grand jury in the prosecution for crimes, "The flexibility or capacity for growth and adaption is the peculiar boast of excellence of the common law."

The general doctrine then is that so long as existing vested property rights are not disturbed, the substantive law, whether of common law or of

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<sup>1</sup> 110 U. S. 530.

statutory creation, is subject to change. That is, a change in the substantive law is not *per se* a deprivation of the rights of life, liberty and property of the individuals affected by it.

In *Munn v. Illinois* <sup>2</sup> the court said: "A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process: but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature. Indeed, the great office of statutes is to remedy defects in common law as they are developed, and to adapt it to the changes of time and circumstances."

It is well known that in England damages for loss of life could not be obtained by the decedent's representatives against the person or persons to whose act or fault the responsibility for the killing rested until Lord Campbell's Act, passed in 1846, the reason being that personal actions, according to the common law, died with the person injured. By this statute, however, which has been copied in all the States of the Union, the right of decedents' representatives to recover has been created.

A further illustration of the power of legislatures to create new, or change old, liabilities may be taken from the decision of the Supreme Court in *Martin v. Pittsburgh, etc., Ry. Co.* <sup>3</sup> In that case the defendant set up as a defence a State statute which provided that persons other than passengers sustaining injuries while lawfully engaged in or about the roads, depots, cars, etc., of the company, though not employees of such company, should have only such rights of action and recovery as would exist if such persons were employees. The constitutionality of this act being contested upon the ground that it was a denial of due process of law, the court said: "If it be conceded, as contended, that the plaintiff in error could have recovered but for the statute, it does not follow that the legislature of Pennsylvania, in preventing a recovery, took away a vested right or a right of property. As the accident from which the cause of action is asserted to have arisen occurred long after the passage of the statute, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated. Such a contention in reason must rest upon the proposition that the State of Pennsylvania was without power to legislate on the subject—a proposition which we have adversely disposed of. This must be, since it would clearly follow, if the argument relied upon were maintained, that the State would be without power on the subject. For it cannot be said that the State had authority in the premises if that authority did not even extend to prescribing a rule which would be applicable to conditions wholly arising in the future."

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<sup>2</sup> 94 U. S. 113.

<sup>3</sup> 203 U. S. 284.

**§ 1217. Employers' Liability at Common Law.**

The extent of the legislative power, by laws operating prospectively to create, abolish or modify legal rights and liabilities, is excellently illustrated in the field of employers' liability for accidents to their employees.

Applying earlier and broader doctrines of the common law, English and American, the courts built up the doctrines: (1), that an employer, even though himself at fault, is not responsible to an employee for an injury which would not have occurred but for the contributory negligence of that employee; (2), that he is not liable for the damages caused by the negligence or other misconduct of a co-employee; <sup>4</sup> and (3), that he is equally free from liability where an injury is due to an unfit or inherently dangerous condition of which the employee had foreknowledge. All three of these rules, it has been quite generally recognized by the courts, may be abolished by legislative act, the effect in each case being, of course, to deprive the employer of a defence which he might otherwise set up. These rules, it has been held, were originally accepted by the courts, not as immutable principles of justice, but as applications of previously established principles of law and, of course, subject to modification as such. In the now famous case of *Ives v. South Buffalo Ry. Co.*,<sup>5</sup> decided March 24, 1911, by the Court of Appeals of New York, in which the constitutionality of a compulsory workmen's compensation act was denied, the court admitted that the abolishment of the fellow-servant doctrine, and the contributory negligence rule, were "clearly and fully within the scope of legislative power." As to the rule regarding the assumption by the employee of the ordinary and obvious risks incidental to the occupation in which he accepts employment, the court, while holding that the legislative power over the rule "is limited to some extent by constitutional provisions," went on to point out that this rule, too, had, without constitutional objection, been legislatively modified in the State to the effect that the employee was presumed to have assented only to the necessary and inherent risks of the occupation and to no others.

This subject was discussed in an illuminating way by Justice Moody of the Federal Supreme Court in an elaborate dissenting opinion filed by him in the *Employers' Liability* case.<sup>6</sup> With reference to the provisions of the Federal statute recognizing a right of recovery of damages for death resulting from negligence, and abolishing the fellow-servant doctrine and the rule of contributory negligence, he there said: "There can be no doubt of the right of a legislative body, having jurisdiction over the subject, to modify the first three of these rules of the common law in the manner in which this act of Congress does it. They are simply rules of law, unprotected by the

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<sup>4</sup> Provided the employer has used reasonable care in the selection and supervision of his employees.

<sup>5</sup> 201 N. Y. 271.

<sup>6</sup> *Howard v. Illinois Central R. R. Co.* (207 U. S. 463).

Constitution from change, and like all other such rules must yield to the superior authority of a statute. They have so generally been modified by statute that it may well be doubted if they exist in their integrity in any jurisdiction. The common law rules have taken form through the decisions of courts, whose judges in announcing them were controlled by their views of what justice and sound public policy demanded. This is nowhere more clearly stated than by Chief Justice Shaw in *Farwell v. Boston and Worcester Railroad*,<sup>7</sup> the leading American case establishing the doctrine that one cannot recover over against the master for the negligence of a fellow-servant, where he said: 'In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned.' But the economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well-settled doctrines of law, have no constitutional sanctity. They are binding upon succeeding judges, but while they may influence they cannot control legislators. Legislators have their own economic theories, their own views of justice and public policy, and their views when embodied in a written law must prevail. Whenever the legislative power to change any of these rules of the common law has been drawn in question in this court it has been sustained. Various State statutes allowing a remedy against a railroad employer for the negligence of a fellow-servant have been held to be within the legislative power.<sup>8</sup> State statutes, allowing a recovery for death, were sustained in *American Steamboat Co. v. Chace*<sup>9</sup> and *Sherlock v. Alling*,<sup>10</sup> though the statute was attacked in the first case only upon the ground that it intruded upon the admiralty jurisdiction exclusively vested in the courts of the United States, and in the second case because it interfered with interstate commerce, whose regulation was vested exclusively in Congress. Statutes of this kind have been in force in the States and doubtless in the Territories for many years, many cases have been tried under them, and in no case has it ever been claimed that anything in the Constitution removes them from the legislative power. The same observation may be made, though not so emphatically, of statutes modifying the common law rule denying a recovery to one contributing to the injury by his own neglect. It is interesting to note that this court, acting upon the same reasons which doubtless influenced Congress in the enactment of this part of the statute, established a rule in principle the same, to govern the

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<sup>7</sup> 4 Met. 49.

<sup>8</sup> *Missouri Pacific Railway Co. v. Mackey* (127 U. S. 205); *Minneapolis, etc., Ry. Co. v. Herrick* (127 U. S. 210); *Chicago, Kansas & Western Ry. Co. v. Pontius* (157 U. S. 209); *Tullis v. Lake Erie & Western Railroad* (175 U. S. 348).

<sup>9</sup> 16 Wall. 522.

<sup>10</sup> 93 U. S. 99.

recovery in admiralty of damages by a person injured on a ship,<sup>11</sup> holding that it promoted 'the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good.' It is enough to say here that the decisions of the court in the safety appliances cases, supporting a statute changing the analogous common law doctrine of assumption of risk, are in principle conclusive that the whole subject of contributory negligence is under the control of the legislative power, in this respect unrestrained by any constitutional provision."

In *Missouri Pac. R. Co. v. Castle*,<sup>12</sup> the court said: "This court has repeatedly upheld the power of a State to impose upon a railway company liability to an employee engaged in train service for an injury inflicted through the negligence of another employee in the same service (citing cases). Obviously, the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow-servant also justify a similar departure in regard to the effect of contributory negligence."

#### § 1218. Liability without Fault and Due Process of Law.

Many instances of liability without actual, as distinguished from constructive, fault upon the part of the person obligated are to be found in the common law—these impositions being justified upon the grounds of public policy. Thus, indeed, the general rule of *respondeat superior*, by which the principal is made responsible for the acts of his agent when acting within the general sphere of what strangers may reasonably suppose to be his authority as such agent, is one which operates irrespective of fault upon the part of the principal who is obligated.<sup>13</sup> The innkeeper is liable for injuries to the goods or persons of his guests. So also, by the common law, there are many things which, though lawful to do, one does at his peril, that is under an absolute responsibility under all cases to make good injuries to persons and property resulting directly from his acts. Thus the ship is liable for the care of sick or injured sailors; persons keeping wild or dangerous animals are liable for the injuries committed by them; a person uses explosives at his peril; a landowner erects a high structure or constructs dams under a liability for accidents caused by their falling or breaking, from which liability he can escape by no proof of care upon his part. The same is true when fires are built.

To these common-law absolute liabilities, statutes, Federal and State, have created other liabilities to which no defence founded upon absence of personal fault may be pleaded, and the constitutionality of these laws

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<sup>11</sup> *The Max Morris* (137 U. S. 1).

<sup>12</sup> 224 U. S. 541.

<sup>13</sup> This appears to have been originally a rule of evidence, namely, that the authorization by its principal was conclusively presumed. Cf. Salmond, *Essays in Jurisprudence and Legal History*, Chap. III, "The Principles of Civil Liability."

has been upheld. Thus, as elsewhere pointed out, employers have been made liable for the injuries to their employees caused by the negligence or misconduct of their co-employees, even when the employer has himself used every reasonable care in the selection and supervision of his employees, and has neglected no obligation imposed upon him for the safe operation of his business. In *Missouri Pacific R. R. Co. v. Mackey* <sup>14</sup> such a law of a State was upheld by the Supreme Court, despite the objection that its effect was the taking of property without due process of law, that tribunal saying: "The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care or precaution may be taken in conducting its business or selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence."<sup>15</sup> The law of 1874 [in question] extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same general direction. That its passage was within the competency of the legislature we have no doubt."

In *St. Louis & San Francisco R. R. Co. v. Mathews* <sup>16</sup> was upheld a State statute making railroads responsible for damages to property or persons injured by fires started by sparks from their locomotives, the court saying: "To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad companies which employ the instruments and create the peril for its own profit rather than upon the owner of the property, who has no control over or interest in those instruments."

In *Bertholf v. O'Reilly* <sup>17</sup> a statute was sustained which created an action for damages in favor of one injured by an intoxicated person, against the lessor of the property where the liquor which caused the intoxication was sold. In its opinion the New York Court of Appeals said:

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<sup>14</sup> 127 U. S. 205.

<sup>15</sup> And even this defence may, as we have already seen, be abolished by statute.

<sup>16</sup> 165 U. S. 1.

<sup>17</sup> 74 N. Y. 509.



"And the act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contribute, although remotely, to produce it. This is what the legislature has done in the act of 1873. That there is or may be a relation, in the nature of cause and effect, between the act of selling and giving away intoxicating liquors, and the injuries for which a remedy is given, is apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension, by the legislature, of the principle expressed in the maxim '*Sic utere tuo ut alienum non lædas*,' to cases to which it had not before been applied, and the propriety of such an application is a legislative and not a judicial question."

In Illinois a similar statute was upheld.<sup>18</sup>

In *St. Louis, I. M. & S. R. R. Co. v. Taylor*<sup>19</sup> the court upheld the constitutionality of the Federal safety appliances acts even though construed to impose upon a carrier responsibility for accidents from which it could not escape by reason of the exercise of reasonable care. The duty imposed was declared to be an absolute one, the court saying: "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars, which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. . . . Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise

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<sup>18</sup> *Wall v. Allen* (244 Ill. 456). See also, cited by the Illinois court, *Hardten v. State* (32 Kan. 637); *Streeter v. People* (69 Ill. 595); *Millen v. Peck* (49 Ohio, 447); and *Gordon v. Halles* (59 Ohio, 342).

<sup>19</sup> 210 U. S. 281.

to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case."

In *Chicago, R. I. & P. R. R. Co. v. Zerneck*<sup>20</sup> the court upheld a State law which imposed an absolute liability upon railroad companies for injuries to passengers except where the passengers were themselves guilty of gross carelessness or misconduct, the ground being that the law was but an extension to persons of the common-law rule which makes carriers practically insurers of goods carried by them. The court said: "No good reason is suggested why a railroad company should be released from liability for injuries received by the passenger while being transferred over its lines, while the corporation must respond for any damages to his baggage or freight;" and then added: "Our jurisprudence affords examples of legal liability without fault,—the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants." The court, however, in the closing paragraph of its opinion, said: "We might extend the discussion and illustrate it by other cases, but, however interesting such discussion might be, we do not think it is necessarily demanded by this record. We think plaintiff in error is precluded from objecting to the rule of liability expressed in § 3. The rule of liability was accepted by plaintiff in error as a part and as a condition of its charter." It would seem, then, that, this being so, all that had earlier been said by the court as to the Federal authority of the legislature to impute liability without fault was essentially *obiter*.

In *Atchison, T. & S. R. R. Co. v. Mathews*<sup>21</sup> the court upheld a State statute requiring a reasonable attorney's fee for the plaintiff to be allowed and made a part of the judgment in a recovery against a railroad for damages caused by fires started by sparks from the locomotives, the measure being declared to be a police measure tending to cause increased care on the part of the railroad to prevent fires from being started from its engines. The law was recognized to lie upon the borders of unconstitutionality, but was held reasonable in view of the great care that may properly be imposed upon one who employs such a dangerous element as fire. The case was thus distinguished from *Railway Co. v. Ellis*<sup>22</sup> in which a

<sup>20</sup> 183 U. S. 582.

<sup>21</sup> 174 U. S. 96.

<sup>22</sup> 165 U. S. 150. Four justices dissented.

law was held void which attempted to impose upon railroads in suits against them the payment to plaintiffs of an attorney's fee, the requirement being declared to be not a penalty to enforce a police regulation, but for failure to pay certain debts.

In *Marvin v. Traut* <sup>23</sup> the court upheld a law authorizing an action to subject a building to payment of a judgment obtained by an informer for the recovery of money lost there in gambling. The law was sustained as a police measure, its object being declared to be the prevention of gambling, and the liability of the owner of the building used for gambling a proper means to that end.

In *Wilmington Star Mining Co. v. Fulton* <sup>24</sup> was upheld a State law which, as construed by the State courts, imposed upon mere owners responsibility for faults of managers, the employment of whom was required by law, and who were required to be selected by the mine owner from those holding licenses issued by the State mining board. The court said: "The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the state, certainly the rights, privileges, and immunities of a mine owner as a citizen of the United States were not invaded by the regulations in question, and the imposition of liability upon the owner for the violation of such regulations, being an appropriate exercise of the police power, was not wanting in due process. And even although the liability imposed upon the mine owner to respond in damages for the wilful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the state to change and modify these principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed also adequately dispose of the contention that, by the statute, the mine owner was denied the equal protection of the laws."

In *C., B. & Q. R. R. Co. v. United States* <sup>25</sup> this language was quoted with approval and the doctrine of the case applied to the enforcement of a penalty, the court saying: "The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned." <sup>26</sup>

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<sup>23</sup> 199 U. S. 212.

<sup>24</sup> 205 U. S. 60.

<sup>25</sup> 220 U. S. 559. See also *Delk v. St. L. & S. F. R. R. Co.* (220 U. S. 580).

<sup>26</sup> Citing *Reg. v. Woodnow* (15 Mus. & W. 404); *People v. Strowberger* (113 Mich. 86); *Com. v. Emmons* (98 Mass. 6); *People v. Roby* (52 Mich. 577); *Edgar v. State* (37 Ark. 219); *State v. B. & S. Steam Co.* (13 Md. 181); and *Greenleaf, Evidence*, 16th ed., §§ 21, 26 and notes. *Greenleaf* says: "Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or

In *Mobile, etc., R. R. Co. v. Tunnsfeld*<sup>27</sup> the court upheld a State law abrogating the fellow-servant rule as to railway employees, and further providing that "proof of injury inflicted by the running of the locomotives or cars of such [railway] company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." The court, after pointing out that the law of evidence is full of presumptions either of law or of fact, said: "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. . . . That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed.

"If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

"Tested by these principles, the statute, as construed and applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation."

In *City of Chicago v. Sturges*,<sup>28</sup> the court upheld an act making the city liable for damage resulting to property situated therein caused by the violence of mobs of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner. This law the State courts had held imposed a liability irrespective of any question of the power of the city to have prevented the injury, or of negligence upon its part. The Supreme

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omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture, of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril."

<sup>27</sup> 219 U. S. 35.

<sup>28</sup> 222 U. S. 313.

Court, while admitting that "it is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against," and that it is also a general principle that a loss from any cause purely accidental must rest where it chances to fall, went on to say: "But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent.

"Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation is reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the Fourteenth Amendment.

"The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the State to preserve social order and the property of the citizen against the violence of a riot or a mob."

And later the court explicitly recognized a direct relation between the provision and the police end which was its justification. "Such a recognition," it declared, "has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property including that of the evil doers, as members of the community; it is likewise calculated to stimulate the exertions of the indifferent and the law abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law."

In *Pizitz Dry Goods Co. v. Yeldell* <sup>29</sup> it was held that a State might provide that punitive damages might be assessed against an employer for the mere negligence of his employee, resulting in death. The court said: "We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only on those at fault, but upon those who, although not directly culpable, are able, nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented. . . . Or it may

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<sup>29</sup> 274 U. S. 112.

impose on the business or enterprise in which such loss of life occurs the economic burden of the protective measure adopted. . . . Or return to and substitute the common law method of permitting the jury to fix the amount of recovery, at least to the extent of an exercise of its reasonable judgment, for the present day method of weighing and measuring the value of human life. The distinction between punitive and compensatory damages is a modern refinement."

## CHAPTER XCVIII

### EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION ACTS

#### § 1219. Constitutional Difficulties in the Path of Workmen's Compensation Acts.

In *Ives v. South Buffalo Ry. Company*,<sup>1</sup> a case which gave rise at the time to a great amount of controversy and comment, the Court of Appeals of New York held invalid the Workman's Compensation Act of that State, enacted June 25, 1910, upon the ground, *inter alia*, that, if enforced, it would operate to deprive employers of property without due process of law in violation both of the Fourteenth Amendment of the Federal Constitution, and of the Constitution of the State. In substance this law, compulsory in character, imposed an absolute liability in specific amounts on employers of workmen engaged in certain enumerated occupations, for injuries sustained by them in the course of their employment, and in whole or part contributed to by a necessary risk or danger of the employment or one inherent in the nature thereof, provided the injury was not due in whole or part to the "serious and wilful misconduct" of the workmen injured. The common-law and statutory rights to bring action could, however, be elected by the employee.

The Court of Appeals in its opinion admitted the constitutionality of laws modifying or abolishing the various defences to these various common-law actions—assumption of risk, contributory negligence, and fellow-servant doctrine,—but found in the law an attempt to go far beyond this and impose upon employers an absolute liability when there had been no fault upon their part—"the rule of liabilities . . . is that the employer is responsible to the employee for every accident in the course of the employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and wilful misconduct on his part."

It was pointed out by the court that the occupations enumerated by the act were concededly lawful occupations, and, therefore, that the special and absolute liabilities attached by the law to their carrying on might not be justified unless their imposition could be brought under the police power of the State. This, the court held, it was impossible to do. The court said: "It [the law] does nothing to conserve the health, safety or morals of the employees and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. . . . Under this law the most thoughtful and careful employer, who has neglected no duty, and

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<sup>1</sup> 201 N. Y. 271.

whose workshop is equipped with every possible appliance that may make for the safety, health and morals of his employees, is liable in damages to an employee through an accident which no human being can foresee or prevent, and which if preventable at all, can only be prevented by the reasonable care of the employee himself."

It is to be conceded that the court had considerable ground for holding that the constitutionality of the law could not be defended as a police measure. It did not seek directly to protect the health or morals of the persons affected, to prevent fraud, or to secure a convenience for the public. Its aim was undoubtedly to transfer, to the extent possible, the economic burden resulting from accidental injury or death from the shoulders of those injured or those dependent upon them, to the shoulders of their employers, and to make this transfer independent of any legal fault, either of omission or commission, upon the part of these employers. The public policy which dictated the act was the belief that the employers would be better able to bear the burden thus imposed upon them than were their employees, and that, in ultimate effect, the interests of the community at large would be correspondingly advanced. That this would in fact be the ultimate effect of the law, if enforced, and that, as an abstract proposition of ethics, it is more just that the employers, rather than the employees, should bear the burden of occupational injuries, is disputable, but these were questions for legislative rather than judicial determination. There remained, then, the fundamental judicial question whether, according to American constitutional doctrines, it is within the sphere of legislative authority thus to advance a general interest at the direct expense of private individuals.

It has been seen that the only manner in which individual property may be taken by the State for a public use is by an exercise of eminent domain, and that, when so taken, it is required, not only by specific constitutional provisions but by due process of law, that compensation shall be made. The fact that, under the New York Workmen's Compensation Act, the property of the employer would not be taken by the State, but would be transferred to other individuals, was not material in so far as the attempt was made to justify the measure as one directly seeking the welfare of the community at large. As earlier quoted, Justice Holmes, in *Noble State Bank v. Haskell*,<sup>2</sup> declared that an ulterior public advantage might justify a comparatively insignificant taking of private property for what, in its immediate purpose, might be a private use, but even this language he hastened to modify (upon a petition for a rehearing of the case) by declaring the true doctrine to be "not that property might be taken for a private use, but that among the public uses for which it might be taken were some which, if looked at in their immediate aspect, according to the proximate effect of the taking, might seem to be private."

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<sup>2</sup> 219 U. S. 104.



In the Bank Guarantee cases it was held by the Supreme Court that banks might be required to contribute in proportion to their average daily deposits to a general fund from which depositors of insolvent banks were to be paid their deposits. The effect of this was, of course, to compel the solvent banks to pay the debts of insolvent institutions, and thus, as the court recognized, looked at in its immediate aspect and proximate effect, the result was to take the property from certain owners and transfer it to other private hands. The court, however, argued that both usage and preponderant opinion gave this sanction "to enforcing the primary conditions of successful commerce;" and that the existence of bank checking accounts, the accuracy of the currency of the checks drawn upon these accounts, and the making safe of the almost compulsory resort of depositors to the banks as the only available means of keeping money on hand, were such primary conditions. In result, then, the law was upheld not as one for the benefit of depositors of insolvent banks, but in order, as said, that the primary conditions of successful commerce might be advanced. The benefit to the insolvent banks and to their depositors, as well as the burden upon the solvent banks, though immediate and proximate, was thus, essentially speaking, incidental in exactly the same way that in hundreds of other ways police laws, the constitutionality of which is not questioned, operate to the incidental advantage or disadvantage of individuals. The same is, of course, true of many, if not most, of the public improvements undertaken by the State, the land for which is taken under the right of eminent domain.

Applying this doctrine to the constitutional points in workmen's compensation laws, it can be shown that the successful carrying on of the industries affected by the acts is not dependent upon the enforcement of their provisions. It can also be shown that such an enforcement will prove an economic burden and hindrance. But this does not meet the point. Those who would maintain the constitutionality of the measure must do so upon the ground that its ultimate intent is neither the benefit of the employers nor of the employees, nor of the industries themselves, but of the social whole. That such a social advantage will result from the enforcement of such laws is a conclusion which, if not absolutely demonstrable, is at least sufficiently arguable to warrant the court's refusing to substitute their opinion for that of the legislature upon the point. In result, then, the Bank Guarantee cases did furnish a possible authority for the validity of compulsory workmen's compensation acts.

As to the doctrine of the Bank Guarantee cases, the New York court, in its opinion, pointed out that the laws involved in these cases were, or, at least, could have been, held valid under the finding of the Federal court itself which, as we have already seen, was that the banking business is one which, from its peculiar and essential nature, is wholly subject to State regulation, or even prohibition. The importance of this point is

evident, for if this were the ground taken, a law such as that involved in *Ives v. South Buffalo Ry. Co.* could be sustained only in so far as it might relate to occupations which are *per se* so dangerous, noxious or immoral as to warrant the States, if they see fit, in absolutely prohibiting their being privately carried on.

The court in *Noble State Bank v. Haskell* suggested that those solvent banks which, under the Guarantee Law, had to contribute to the payment of depositors of insolvent institutions, might be held to be compensated by the potential protection which they received. "It would seem," the court said, "that there may be other causes besides the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." This, when the scheme is a compulsory one, was a novel doctrine, and the court was not, in fact, able to cite adequate authority for it. The only case to which it referred was that of *Ohio Oil Co. v. Indiana*<sup>2a</sup> but that case was hardly apposite, since the doctrine declared by it was only to the effect that natural gas and oil are not private property until reduced to possession, or that, if the owners have a property right therein, it is one in common with others, the natural supply constituting a common fund, the waste of which may be prevented by State-established regulations. It could not, of course, be maintained that the deposits of all the banks constituted a fund owned in common. The guarantee fund could be so considered, but the question before the courts was as to the power to compel the individual banks to create such a fund, and not as to its control when created.

Cases more nearly analogous to the Workmen's Compensation Act were those which had supported laws providing for firemen's, teachers', sailors', and other pension or insurance funds.<sup>3</sup> These funds when created by contributions compulsorily exacted of the individuals who are eligible to receive the pensions, when upheld, have been brought under the taxing powers of the States, and have been considered as special assessments, and justified as such; that is, on the ground that those assessed are specially benefited by the purposes for which the proceeds from the assessments are expended, and, of course, that such purposes are public in character. Where these two elements have not been present, the laws have been held void.

Viewing the enforced contributions from the employers as special taxes, some have defended them upon authority of *Firemen's Benevolent Association v. Lounsbury*,<sup>4</sup> *State v. Cassidy*,<sup>5</sup> and *McGlone v. Womack*.<sup>6</sup>

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<sup>2a</sup> 177 U. S. 190.

<sup>3</sup> Of course where there are State officials their pensions may be deemed a part of their salaries or wages.

<sup>4</sup> 21 Ill. 511.

<sup>5</sup> 22 Minn. 312.

<sup>6</sup> 129 Ky. 274.

These authorities, however, go only so far as to authorize contributions to a fund in the distribution of which the contributors themselves directly participate, or which is used for the payment of damages directly traceable to their acts, which acts, like the keeping of dogs, or the use of fire, the State may properly declare may be done only at one's peril. The cases, therefore, are authority only if the industries embraced within workmen's compensation acts are so inherently dangerous that one engages in them at his peril.

If the contributions exacted of the banks by the guarantee law were considered as special assessments, and the law thus brought under the taxing instead of the police power, the constitutional question was not made easier, for there still remained the same necessity to show that the purpose of the law was a public one. And the same is true of a workmen's compensation act which provides for the payment of compensations from a fund created by enforced contributions from the employees. If the fund is to be created by enforced contributions from the employers, who, of course, are not the ones to whom the indemnities are to be paid from the fund, there is additional difficulty in showing that they will derive any compensation from their participation in the scheme. This, as a matter of fact, it is not easy to demonstrate. If it be argued that the obligations imposed by the act upon the employers are compensated for by their corresponding exemption from their common-law liabilities, the answer, of course, is that, according to the act, compensation is exacted where there is, or would be, no common-law liability whatever. If then, accruing benefit to the employer is to be shown, it must be in the indirect and intangible form of benefits received from the improved industrial and economic conditions of the workmen which, it may be alleged, will follow from the enforcement of the measure.

It was argued that the New York law could be constitutionally justified not as an exercise of either the State's police power or of its power of taxation, but simply as an exercise of the general legislative power to determine civil rights and liabilities. In support of this view reliance was placed upon the various instances in which laws imposing liabilities without fault upon the part of the persons obligated have been imposed had been upheld as constitutional. In the writer's opinion, however, this view was not correct. Clearly a workmen's compensation act cannot be upheld simply as a modification of the law of contracts, that is, as one which reads the liability into the contract between the employer and the employee, for, so construed, it would be a clear violation of that freedom of contract which the Fourteenth Amendment has been declared to protect.<sup>7</sup>

If a workmen's compensation act be viewed as one within the field of torts, the analogy with those cases in which one is held to act at his peril

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<sup>7</sup> *Adair v. United States* (208 U. S. 161); *Lochner v. New York* (198 U. S. 45).

is superficially close, but identity cannot be established unless the law be limited in its application to those occupations the carrying on of which is unavoidably dangerous, and even then only when the absolute liability is limited to compensation for accidents resulting from that intrinsic dangerousness. Only thus, for instance, can the law be brought within the doctrine of *St. L. & S. Fr. Ry. Co. v. Matthews*.<sup>8</sup>

In the *Matthews* case the court said: "When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property who has no control over or interest in those instruments."

Here, aside from the fact that the railroad was conceded to be employing a dangerous element,—fire,—there was the point that the persons injured by its employment were neither interested in, nor did they have control over its use. In the case of the employments embraced within the operation of the New York law, upon the contrary, the employee was jointly engaged with the employer and was, of course, interested in the carrying on of the business.

The case of *Chicago, R. I. & Pac. Ry. Co. v. Zerneck*<sup>9</sup> did not furnish authority for the New York law, for the reason that in that case the regulation related to a public service corporation (a railroad), and furthermore, as the Supreme Court expressly stated, the rule of liability at issue was one created by the very statute under which the corporation took its charter.

The cases in which laws creating a liability on the part of the employer to compensate employees injured through the negligence of co-employees could not be held to govern, for the reason that in those cases a right of recovery was given only where there had been fault, the doctrine of *respondet superior* being applied to render the employer responsible for the acts of his servants.<sup>10</sup> The "Civil Damage Act," upheld in *Bertholf v. O'Reilly*<sup>11</sup> was distinguished from a compensation act in that the liability without fault therein imposed was upon the owners of premises used for a business (the selling of intoxicating liquors), which, it is recognized, the State has an absolute power to prohibit and which it may, therefore, regulate at will.<sup>12</sup> Furthermore, the liability which was created was to an outsider, and not, as in the New York law, to one privy to the business.

The attempted analogy with the liability of a ship for injuries suffered

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<sup>8</sup> 165 U. S. 1.

<sup>9</sup> 183 U. S. 538.

<sup>10</sup> *Railway v. Mackey* (127 U. S. 205); *Railway v. Herrick* (127 U. S. 210).

<sup>11</sup> 74 N. Y. 509.

<sup>12</sup> See also *Marvin v. Traut* (199 U. S. 212).

by its sailors also fails, for the reason, that, as is well known, the contracts and services of sailors since early times have been held to be exceptional in form and character, the necessities of the case demanding and authorizing special regulation. As the court in the *Ives* case said, the sailor is, "in effect, a co-adventurer with the master and shares in the risk of shipwreck and capture, often losing his wages by casualties which do not affect workmen on land."

Professor Wambaugh has pointed out that when the statement is made that, generally speaking, the requirement of due process of law prevents the imposition of a liability for an act or occurrence upon a person who is not at fault, the meaning is that this liability cannot be imposed where the person obligated is outside of the chain of causation. But, he claims, the employer is not outside the chain of causation which results in the accidents to his employees. "The employer has voluntarily participated in creating the relation of master and servant as to this business enterprise. Certain dangers, including negligence of the workman and of the fellow-servants, are inevitable as a business proposition. . . . Both employer and employee, by entering upon an enterprise in company, assent for their own business purposes to the creation of a relation which will inevitably result in accidents and will thus cast burdens upon society. . . . In a sense, then, there is no wholly innocent man in the transaction. The law—by judicial decision—used to place the preliminary burden upon one of them—upon the workman. The law—by the new statute—now places the preliminary burden upon the other." <sup>13</sup>

This reasoning is not convincing. The employer, assuming him to be without fault,—that is, assuming that he has satisfied all the requirements of law with reference to the use and operation of machinery, has exercised due care in the selection and supervision of his employees, etc.,—is not within the chain of causation when accidents occur, except in so far as he may have entered into contractual relations with his employees. Therefore, when the attempt is made to deduce from this relationship obligations not included within the terms of the contract, the contractual freedom of the employer (and of the employee, if the option of resorting to his common-law rights is refused him) is infringed. The only way in which the conclusion can be avoided is by limiting the operation of the act to those employments in which the individual cannot be said to have not an original common-law right to engage in, and which, therefore, when engaged in, are subject to such limitations as the State may see fit to impose.

<sup>13</sup> Some writers have sought to uphold a workman's compensation law upon the ground that it is analogous to State legislation in restraint of monopoly, or to the Federal law against restraint of interstate commerce. It is clear, however, that the analogy cannot be sustained for the double reason that,

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<sup>13</sup> *Harvard Law Review*, December, 1911.

at common law, combinations in restraint of trade are themselves unlawful and tortuous, and because legislative acts against monopoly are aimed directly at price regulation by forbidding the contracts by which those prices are or may be unduly enhanced, whereas workman's compensation acts aim to regulate a relation between employer and employee which in itself has no tortuous element or effect. In its direct economic effect, such a law simply shifts a burden from the shoulders of those upon whom it first falls to the shoulders of others. It is, therefore, not analogous to laws in restraint of monopolies, the direct effect of which laws is to protect the public generally against excessive prices.

Viewing workmen's compensation acts as frankly measures to promote a more just, or socially more desirable, distribution of economic goods than is secured by competitive processes, as regulated by traditional common-law doctrines of tort and contract, some have sought to sustain them as being substantially similar to those State measures whereby, at the public expense, charity is extended to the indigent and free education furnished to the public.

The writer is not disposed to admit that either of these State aids to its citizens furnishes a fair precedent for compulsory workmen's compensation laws. Education is provided by the State upon the ground that it is politically inexpedient (at least in a popular government), that the people should be without education. Furthermore, the educational facilities thus provided are open to all and not to particular individuals, and the expense entailed is met by taxes which, according to established constitutional requirements, must, if not levied upon all individuals or all property of a given kind, be levied upon individuals or property classified upon a reasonable basis. As regards State poor relief, it is to be said that this also is a matter of public policy rather than of distributive justice. It is politically unwise that there should be a portion of the citizen body in a condition of bodily want, just as much as it is undesirable that sickness and accidents should be prevented. As a matter of fact, however, if the question be considered from a constitutional point of view, the courts have established the doctrine that, in determining what is a public purpose which will justify expenditures for the meeting of which taxes may be generally levied, the historical fact may be accepted as decisive that the function has, by general acquiescence and practice, been recognized as a proper one to be performed by the State.<sup>14</sup> Also, it does not need to be said that compulsory workmen's compensation, whatever form it may assume, whether by way of State insurance, or by imposing the burden of compensation upon

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<sup>14</sup> There is considerable authority to the effect that a State may not furnish poor relief to persons who are not under its control as inmates of State-regulated institutions, or as otherwise under its supervision and control. Cf. Goodnow, *Social Reform and the Constitution*, Chapter VII.

the employers, is not a form of poor relief, for the compensations are provided without regard to the financial status of those who receive them.

### § 1220. Other State Decisions.

Since the decision of the New York Court of Appeals in *Ives v. South Buffalo Ry. Co.*, there have been several pronouncements by State courts which may be noted. The justices of the Supreme Judicial Court of Massachusetts, in an opinion handed down upon request of the senate of that State, upheld the validity of a proposed optional workman's compensation act.<sup>15</sup> The justices said: "There is nothing in the act which compels an employer to become a subscriber to the association or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to. . . . Taking into account the non-compulsory character of the proposed act, we see nothing in any of these provisions which is not in conformity with the Fourteenth Amendment to the Federal Constitution, or which infringes upon any provision of our own constitution in regard to the taking of property without due process of law."

In *State ex rel. Davis-Smith Co. v. Clausen*,<sup>16</sup> decided in 1911, the Supreme Court of Washington held valid a law of the State abolishing civil actions and civil causes of action for personal injuries incurred in certain industries declared to be extrahazardous, and providing for the creation of a compensation fund by enforced contributions from employers therein, and declaring that no employer should by any rule or contract exempt himself from the burdens or waive the benefits of the act. The measure was declared by the court to be a police measure. The intent of the law was declared to be that the burden of the accidents (many of them unavoidable), was to be "borne by the industries causing them, or, perhaps, more accurately, by the consumers of the products of such industries." This principle was asserted to be "economically, socially and morally sound," and the court said: "The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the subject."

In *Borgnis v. The Falk Co.*,<sup>17</sup> decided in 1911, the Supreme Court of Wisconsin upheld the workmen's compensation act of the State which, however, was not a compulsory measure. The court declared: "We are, therefore, relieved from all consideration of the question whether a compulsory compensation act offends against those clauses of the State and Federal constitutions which guarantee all citizens against the deprivation of property without due process of law. This would be a question of greater difficulty than those which are presented in the present case."

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<sup>15</sup> 96 N. E. Rep. 308.

<sup>16</sup> 65 Wash. 156.

<sup>17</sup> 133 N. W. 209.

In *Northwestern Improvement Co. v. Cunningham*,<sup>18</sup> the Supreme Court of Montana upheld a State statute providing for an insurance fund for the benefit of employees injured in coal mining, the fund being created by obligatory contributions exacted from employers on the basis of the product of their mines, and by employees upon the basis of their gross earnings. The law was defended as a police measure, and as providing, in effect, a system of State insurance, the claims upon the fund for indemnity being explicitly declared to be in no sense suits, or actions, or causes of action. The sole object of the law was declared to be "to prevent persons injured in coal mines and their dependents from becoming public charges." "Viewed in this light," the court asserted, "the private benefits to be derived from the law may be wholly disregarded and its primary object held to be one of public concern solely." Furthermore, the court argued that the effect of the law would be to decrease the expense of litigating damage suits, and, therefore, that a public interest was subserved by it. "Any statute," the court said, "which has a tendency to reduce the present enormous expense of operating our courts would seem to be, presumptively, a proper exercise of the police power." Upon this theory, it might be observed that any law, however arbitrary, denying a right of action, would be presumptively valid, for its effect would be *pro tanto* to decrease the work of the courts. The court concluded this part of its argument with the statement that "if the people, represented by their legislature, are of opinion that the public interests demand that industrial insurance ought to be substituted in whole or in part for actions for wrongs, this court certainly cannot say that they are in error."

The court then went on to hold that the contributions to the funds exacted by the law were not to be likened to special assessments for local improvements, but as "an employment tax upon the occupations of operating and working coal mines," and that "it is not at all necessary, to justify the imposition of such a tax, that the business itself should particularly require police supervision, although, as we have seen, extra hazardous enterprises may demand restraint and regulation. Such a tax may be imposed either for regulation, for revenue, or for both."

In *State ex rel. Yapple v. Creamer*,<sup>19</sup> decided in 1912, a voluntary compensation act of Ohio was held valid. By this law, as in the other voluntary compensation schemes, both employers and employees were left free to accept or refuse the burdens and benefits offered by the laws, but they made it decidedly disadvantageous to the employers not to come under their provisions, by declaring that in case they did not do so they could not, when sued, set up the common-law defences of the fellow-servant rule, the assumption of risk, and contributory negligence. This, it had been claimed

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<sup>18</sup> 119 Pac. 554.

<sup>19</sup> 69 N. E. 602.



by those opposed to the measures, rendered the acts practically coercive. The courts have, however, in every case, held this not to be so. The reasoning is not, however, very convincing.

### § 1221. Workmen's Compensation Acts in the Supreme Court.

In order to overcome the doctrine of the *Ives v. South Buffalo* case,<sup>20</sup> so far as its own constitutional law was concerned, the State of New York in 1914, adopted a constitutional Amendment,<sup>21</sup> and, under authorization of that amendment a law was passed by the legislature of New York and its constitutionality sustained by the New York courts.<sup>22</sup> In *New York Central R. Co. v. White*.<sup>23</sup> the law was again sustained, and upon writ of error reached the Supreme Court of the United States in order to determine whether the act satisfied that court's judgment as to the requirements of the Federal Constitution with regard to due process of law.<sup>24</sup> Thus, for the first time, the Supreme Court was called upon to pass upon the constitutionality, as tested by the due process of law provision of the Fourteenth Amendment, of an employers' liability and workmen's compensation act.

The law involved in this case, in lieu of the common-law liability confined to cases of negligence, imposed a liability upon employers to make compensation to their employees for disabling or fatal accidental personal injuries received by them in the course of their employment in certain occupations declared to be "hazardous" in character, without regard to whether or not there might have been contributory negligence upon the part of the injured employees, but only in cases where there had not been

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<sup>20</sup> 201 N. Y. 271.

<sup>21</sup> This Amendment provided: "Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except when the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized shall be held to be a proper charge in the cost of operating the business of the employer."

<sup>22</sup> *Jensen v. Southern Pac. R. Co.* (215 N. Y. 514).

<sup>23</sup> 216 N. Y. 653.

<sup>24</sup> *New York Central R. Co. v. White* (243 U. S. 188).

a wilful intent upon the part of such employees to produce such accidents, or where the injury had not resulted solely from or because of their being intoxicated. The compensation to be paid was to be according to a scale prescribed in the act and based upon loss of earning power, regard in this respect being had to wages previously received and the character and duration of the disability, and, in cases of death, according to the dependency of the surviving wife, husband or infant children.

The Supreme Court, following in the main the reasoning of the Washington court in *State ex rel. Davis & Smith Co. v. Clausen*,<sup>25</sup> upheld the act. The fellow-servant doctrine, it was pointed out, was of comparatively recent origin "being the product of the judicial conception that the probabilities of a fellow-workman's negligence is one of the natural and ordinary risks of the occupation assumed by the employee and presumably taken into account in the fixing of his wages." "It needs no argument," said the court, "that such a rule is subject to modification or abrogation by a State upon proper occasion." And the same, declared the court, could be said of the general doctrines of assumption of risk by the employee, and of contributory negligence. The court, however, added, though it declared no opinion in the matter, since the instant case did not require it to do so, that, should a State abrogate common-law rights of action or defences without providing a fair substitute for them a constitutional question would arise. The court said: "Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether a State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead."

As regarded the scheme of compensation provided for by the act, the court found it not unreasonable or arbitrary, either in the amounts stipulated or their mode of allotment. The laws of nature, said the court, could not be overcome so as to distribute or shift the border of physical suffering, but the pecuniary losses from accidents causing disabilities or death could be. Earning power, said the court, stands to the employee as his capital in trade, and the loss of it is a loss arising out of the business and may be charged up to that business as an expense of operation as truly as may be repairs to broken machinery or other expenses ordinarily borne by the employer. "It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in

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<sup>25</sup> 65 Wash. 156.

cases where he or those for whose conduct he is answerable are found to be in fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his defendants. Nor can it be deemed arbitrary or unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale."

As to the objection that the law imposed liability without fault the court said that this was no novelty in the law.<sup>26</sup> "In extending the question of fault, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed,—and that is, the employment itself. For this both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result."

As a limitation upon the freedom of contract of the employees as well as of the employers, the court declared the act to be justified as a reasonable exercise of the police power of the State. "The subject matter in regard of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." The court said that it did not overlook the fact that the act imposed no rule of conduct upon the employer with respect to employing safety devices or in other ways guarding against accidents, but that this was not the aim or purpose of the act. "This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to them. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of their employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the same category."

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<sup>26</sup> Citing *St. Louis & S. F. R. Co. v. Mathews* (165 U. S. 1); and *Chicago, R. I. & P. R. Co. v. Zernecke* (183 U. S. 582).

It is to be observed that this justification of the act as a legitimate exercise of the police power was hardly necessary in view of the fact that its constitutionality had already been justified as a proper legislative measure for changing common-law rights and liabilities.<sup>27</sup>

In *Hawkins v. Bleakly* <sup>28</sup> a Workmen's Compensation Act of the State of Iowa was held not to offend against the constitutional requirement of due process of law which gave to the employer the right to reject the law's compensation features but provided that, if he did so, he could not escape from liability in damages for personal injuries received by his employees in the usual course of their employment on the ground that the employee assumed the risk of his employment, or because of the employee's negligence, unless this was wilful and with intent to cause the injury or the injury was the result of intoxication of the injured one, or because the injury had been due to the negligence of a coemployee. It was also provided by the act that, in an action for damages, the injury was to be presumed to have been due to the negligence of the employer, upon whom should lie the burden of proof of disproving this presumption. This feature of the law, the court also found unobjectionable.

In *Mountain Timber Co. v. Washington* <sup>29</sup> a workmen's compensation act of the State of Washington was upheld which, as distinguished from the New York and Iowa acts, divided the industries of the State into two classes according to their conceived degrees of hazardousness to their employees, and, furthermore, provided that every employer in each class should contribute certain scheduled amounts to a public fund out of which compensation should be paid to employees injured in the course of employment in the industries of the class. Each general group or class of the industries of the State was thus to be liable for all the injuries to workmen in that class. This special feature of the law was sustained upon the ground that the assessments upon the employers were in the nature of a tax for promoting the general interest of the group paying it, the scheme being in some sense one of insurance and in some sense one of pensioning. The authority relied upon as to this was *Noble State Bank v. Haskell*.<sup>30</sup>

In *Arizona Copper Co. v. Hammer* <sup>31</sup> a State workmen's compensation law was upheld which gave to the injured employee in certain specified hazardous occupations three alternatives: either to sue under the common law freed from the fellow-servant defence, and leaving the defences of contributory negligence and assumption of risk to the jury; or to obtain

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<sup>27</sup> Cf. "The Workmen's Compensation Cases," by T. R. Powell, in 32 *Political Science Quarterly*, 542.

<sup>28</sup> 243 U. S. 210.

<sup>29</sup> 243 U. S. 219.

<sup>30</sup> 219 U. S. 104. Four justices dissented in the instant case, but without stating the reasons for their dissent.

<sup>31</sup> 250 U. S. 400.

relief under the Employers' Liability Law which applied to hazardous occupations where the injury or death was not due to the plaintiff's own negligence; or to rely upon the Compulsory Compensation Law which was applicable to especially dangerous occupations, and under which he could recover irrespective of fault on the part of the employer.<sup>32</sup>

As showing the radical character of the law sustained in this case, the following characterization of it may be quoted from the dissenting opinion of Justice McReynolds, concurred in by the Chief Justice and Justices McKenna and Van Devanter: "We have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the State, and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries,—including physical and mental pain,—which may be recovered by the injured party or his administrator for the benefit of widow, children, parents, next of dependent kin, or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant,—a minute seems enough; wages contracted for bear no necessary relationship to what may be recovered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under the act, or under the Compensation Law, or according to the common law, materially modified in his favor by exclusion of the fellow servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain, and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return."

In connection, generally, with the liberal position which, as has been seen, the Supreme Court has taken with regard to the right of the legislature to fix the law and procedure under which injured workmen (or the representative of killed workmen) may receive compensation for accidents in certain employments, regard is to be had to decisions of the court, many of them extremely liberal in character, as to when an injury may be said to have been suffered in the course of the workmen's employment.

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<sup>32</sup> Four justices dissented on the ground that the Arizona law in the instant case was distinguishable from the laws which had been previously sustained in that the employer was not exempted from any liability formerly imposed, and thus was given no *quid pro quo* for the new burdens imposed upon him. In other words, that the common-law rules were set aside without a reasonably just substitute for them being provided. Also, that the ordinary risks of the occupation were imposed upon the employers without defined limit, and that, thus, compensation might have to be paid to the injured or killed employee not only for loss of earning power but for physical suffering and mental pain.

As regards what may be considered a hazardous employment and as to accidents due to hazards inherent in the employment, an interesting case is that of *Ward v. Krinsky*.<sup>33</sup> In this case was upheld a New York law which added to the employments covered by the existing Workmen's Compensation Law a new group consisting of "all other employments not heretofore enumerated, carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant, or away from the plant of the employer under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

The provision was held not to deny equal protection of the laws because of the exclusion of farm laborers and domestic servants, the classification being declared a reasonable one. Also the law was upheld as applied to an accident which, while suffered in the course of the employment, had not been due to any hazard typical of the employment. The court admitted that it would not be conclusively bound by a legislative declaration as to what occupations were to be deemed hazardous, but the instant case showed how far the court would go in accepting as reasonable the legislative declaration. The court said: "The legislature, in the New York system, is justified in extending the benefit of the Compensation Law as far as it reasonably may determine occupational hazard to extend,—to the 'vanishing point,' as it were,—and any lines of group definition it may adopt, if easily understood and applied, cannot reasonably be called 'an empty form of words' merely because they do not carry on their face the reasons for adopting them."

As yet, then, the Supreme Court has upheld Workmen's Compensation Acts only as applied to hazardous occupations, but it has accepted such broad legislative declarations as to what occupations are to be deemed hazardous in character that it is difficult to say of what occupations this character may not be predicated.<sup>34</sup>

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<sup>33</sup> 259 U. S. 503.

<sup>34</sup> Justice McReynolds in a dissenting opinion, concurred in by Justice McKenna, said: "Hazard is something more than the mere possibility of injury, which is always present. Opinions of the court below have so construed the challenged provisions that if a merchant, while employing five hundred clerks in New York City, no one of them within the Workmen's Compensation Act, should employ four workmen to paint signs or nail up boxes at Buffalo, all of his clerks would immediately come under the act. The occupation of a clerk stationed in New York City cannot be rendered hazardous simply because four workmen are employed at Buffalo. To argue that an occupation is hazardous because someone has received personal injuries is not helpful. Many persons have suffered fatal accidents while eating, but eating can hardly be called hazardous. If, as suggested by the court below, 'it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged,' irrespective of anything else, then the assumption is contrary to common experience.

In *Sheehan Co. v. Shuler*<sup>35</sup> and *New York State Railways Co. v. Shuler*,<sup>36</sup> laws were held constitutional which required employers to pay money into State funds for the vocational rehabilitation of injured employees in addition to the sums payable for compensation for the accidents.

### § 1222. Workmen's Compensation for Diseases Due to Their Employments.

In a number of States statutes, similar to those relating to accidents, have been passed providing for compensation to workmen for diseases incurred by them arising out of the character of the employments engaged in by them.<sup>37</sup> Though the constitutionality of none of these laws has been tested before the Supreme Court, it may be safely said that they will be judged upon the same basis as the Compensation Acts relating to accidents. In some cases, indeed, the State courts have treated the acquiring of these diseases as "accidents" incurred in the course of employment. In other cases the statutes have themselves so directed.

### § 1223. Compulsory Insurance by Automobilists.

There has been considerable agitation for the enactment of laws of various kinds compelling owners or operators of automobiles on the public roads to take out compensation as distinguished from liability insurance against accidents to other persons or property. If such legislation is secured its constitutionality will undoubtedly be judged in accordance with the principles which have been applied to Employers' Liability and Workmen's Compensation Laws.<sup>38</sup> In some States there are already laws requiring motor busses and taxicabs operating on city streets and roads to carry liability insurance, and the constitutionality of these laws as applied to city streets has been sustained by the Supreme Court in *Packard*

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If the State has power to declare an employer liable whenever his employee is injured, irrespective of hazard, the discussions heretofore indulged which treated hazard as important were unfortunate and misleading. But if that element can be wholly disregarded, then consideration must be given to the classification adopted by the New York statute in its relation to the equal protection clause. As often declared, classification is permissible when reasonable. But what possible reason is there for imposing liability in favor of a hundred employees otherwise outside of the Compensation statute, simply because their employer has found it desirable to have four men to do manual work in a shop or dig trenches, miles away from the only place where the hundred serve?"

<sup>35</sup> 265 U. S. 371.

<sup>36</sup> 265 U. S. 379.

<sup>37</sup> Cf. Article by J. P. Chamberlain, "Worker's Compensation for Diseases Due to Employment" in 10 *American Bar Association Journal*, 647.

<sup>38</sup> Cf. Article "Compulsory Automobile Insurance" by R. S. Marx in 11 *American Bar Association Journal*, 731, and "Compulsory Insurance of Automobiles" by J. P. Chamberlain in 12 *American Bar Association Journal*, 49.

v. Barton.<sup>39</sup> To the contention in this case that vehicles operated for revenue were discriminated against as contrasted with those operated for private ends the court said: "If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purpose of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature deems proper."

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<sup>39</sup> 264 U. S. 140.



## CHAPTER XCIX

### DUE PROCESS OF LAW AND EMINENT DOMAIN

#### § 1224. Public Purpose or Use.

In cases which have been elsewhere considered it has been seen that the requirement of due process operates to prevent the transfer, by simple legislative act, of the property of one individual, or of a private corporation, to another individual or private corporation. The same doctrine is now established with reference to a legislative attempt to take private property for a private use, with or without compensation to the owner. It is clear that in the earlier cases the doctrine that in any case where property is taken under an exercise of eminent domain that compensation must be made, was not founded upon the idea that substantive, as distinguished from procedural, rights, are protected. Indeed, this principle seems at first to have been expressly repudiated, and the rule declared that if the process of the taking of private property for a public use be unobjectionable, the due process requirement is satisfied, even if there be no provision for compensation to the owner.

In *Davidson v. New Orleans*,<sup>1</sup> the court took pains to distinguish the requirement of due process of law from the requirement that compensation be made when private property is taken for a public use, and the fact was pointed out that when the due process provision was taken from the Fifth Amendment and inserted in the Fourteenth Amendment as a restraint upon the States, the other prohibition in juxtaposition to it as to the taking of property for a public use without compensation, was not so taken. The court said: "It [a law taking private property for a public use] may possibly violate some of those principles of general constitutional law which, if we were sitting in review of a circuit court of the United States, as we were in the *Topeka* case,<sup>2</sup> we could take jurisdiction of. But, however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that, when by the laws of the State the party aggrieved has, as regards the issue affecting his property, a fair trial in a court of justice, according to the mode of proceeding applicable to such case, he has been deprived of that property without due process of law."<sup>3</sup> In *C., B. & Q. R. R. Co. v. Chicago*, the taking of private property without compensation was,

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<sup>1</sup> 96 U. S. 97.

<sup>2</sup> *Loan Assn. v. Topeka* (20 Wall. 655).

<sup>3</sup> Citing *Kennard v. Morgan* (92 U. S. 480), and *McMillan v. Anderson* (95 U. S. 37).

however, squarely held illegal as a denial of due process. But, as in the Davidson case, such a taking was viewed as a violation of the requirement upon the procedural side rather than upon its substantive side; that is, the legislative provision authorizing it was viewed as, in essence, a judgment of deprivation, and not a legislative act. The following was the language of the opinion: "But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it would be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation, would be a mockery of justice. . . . The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

In this case certain property of the plaintiff railroad had been taken for a public use, and in the court below damage to the extent of but one dollar had been awarded. The contention of the railroad company was that this amount was so small as to be no compensation at all. As to this the Federal Supreme Court said: "Undoubtedly the verdict may not unreasonably be taken as meaning that, in the judgment of the jury, the company's property proposed to be taken was not materially damaged." The question, then, was as to the power of the court to go behind the final judgment of the State court for the purpose of reexamining and reestimating the facts upon which this verdict was rendered. This, it was held, the last clause of the Seventh Amendment forbade. But it was held that it did lie within the power of the Supreme Court to examine whether the trial court had prescribed any rule of law for the guidance of the jury that was in disregard of the company's constitutional right to just compensation. No such error was found and the judgment below was affirmed.

In result, then, it is established that taking private property for public use is not *per se* a taking without due process any more than is an exercise of the taxing power. In both cases it only becomes such when proper procedural methods are not provided, or when the taking is not for a public use, or, in the case of eminent domain, when adequate compensation is not made.

In *Bangor & P. R. Co. v. McComb* <sup>4</sup> the court said: "As between indi-

viduals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate."

A somewhat different phase of the question as to what constitutes a public purpose or use is presented when, by an exercise of the police power, or of eminent domain, or of both, private property is authorized to be taken or employed by private persons for their own individual gain or for uses to which the public is not admitted, as, for instance, means of transportation, which, though privately owned and operated, are used by the public.

Here, the actual use not being public, the justifying public interest has to be deduced from the special character of the private use which is authorized. Thus, in *Hagar v. Reclamation District* <sup>5</sup> the court upheld a State law which provided for the creation of reclamation districts which were authorized to construct drainage canals for the drainage of marshes, and to charge the costs to the parties specially benefited. This was justified by the court upon the ground that the real and substantial purpose of the law was to benefit the health and prosperity of the community, and, therefore, a legitimate exercise of the State's police power.

In *Head v. Amoskeag Manufacturing Co.*,<sup>6</sup> a State law was upheld which authorized individuals to erect, and maintain on their land, water mills and dams across non-navigable streams, upon compensation being made to owners of land injured by being flooded thereby. Here, it was contended, that what amounted to an exercise of the right of eminent domain was granted to the owners of such mills and dams for their own private advantage. As to this the court said: "The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it when not required for the determination of the rights of parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature. When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to

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<sup>5</sup> 111 U. S. 701.

<sup>6</sup> 113 U. S. 9.

measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control or interest in the property is thereby modified. In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided. . . . will order the whole estate to be sold."

"The right to the use of running water is *publici juris* and common to all the proprietors of the head and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above and below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spreads over the lands of others, they could, at common law, bring successive actions against him for the injury so done them, or even have the dam abated. Before the Mill Acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute for the common law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which anyone whose land is flooded can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury."

In *Fallbrook Irrigation District v. Bradley*<sup>7</sup> was questioned the validity of an act of California which provided for the organization of irrigation "districts" which were given authority to enter upon lands, to acquire by purchase or condemnation the lands needed for the construction of irrigation works, canals, etc., to acquire canals and other private irrigation works already in existence, to issue bonds for the expenses thus incurred, and to assess all benefited property for their payment. In its opinion the court declared that unless the purpose sought to be secured was held to be a public one, no scheme of irrigation could be formed or carried into effect. This, the court declared, while not a conclusive reason for holding the use to be a public one, was yet an important fact to be considered. If not so held, the court said, "millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will, therefore, remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of

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<sup>7</sup> 164 U. S. 112.

otherwise worthless lands would seem to be a public purpose and a matter of public interest not confined to the land owners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellows in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands." And, the court continued: "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar conditions of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared, upon the whole, to be for the public benefit." In fine, the case was held to be governed by the doctrine declared in *Hagar v. Reclamation District*.<sup>8</sup>

In *Strickley v. Highland Boy Gold Mining Company*<sup>9</sup> a private corporation was permitted to obtain a right of way across private property for an aerial bucket line. This case, in turn, relied upon *Clark v. Nash*<sup>10</sup> in which was upheld a statute permitting a private party to condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch in order to obtain water from a stream in which he had an interest. The court said: "Where the use is asserted to be public and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a State statute, we are always, where it can fairly

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<sup>8</sup> In *Eldridge v. Trevevant* (160 U. S. 452), it was held that in Louisiana the doctrine, derived from the Code Napoleon, had been established before the annexation of the territory to the United States, that the public has a servitude over lands bordering upon navigable rivers, for the purpose of making levees, without compensation to owners, and that the servitude continued to attach to lands the titles to which had been derived from the United States.

<sup>9</sup> 200 U. S. 527.

<sup>10</sup> 198 U. S. 361.

be done, strongly inclined to hold with the State courts when they uphold a State statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private." The court, however, took the precaution to say: "We do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that, in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

In *Otis v. Ludlow Manufacturing Co.*<sup>11</sup> the court held that, under the local and peculiar conditions prevailing in Massachusetts, the State had a power to authorize individual millowners to obtain necessary water power for their mills by erecting dams, even though upper lands were thereby flooded, due compensation being made to the owners of such lands for the damage done. In other words, relying upon *Clark v. Nash* and *Strickley v. Highland Boy Gold Mining Company*, it was declared that the peculiar physical conditions and the requirements of water power made it a matter of public, as distinguished from a private, interest that private millowners should be enabled to obtain the necessary water power.

In *Offield v. N. Y., N. H. & H. Ry. Co.*<sup>12</sup> the court upheld a law of Connecticut providing that where a railroad company is the lessee of another railway company and the owner of three-fourths of its stock, it may obtain, by condemnation proceedings if necessary, the remaining outstanding shares. It was declared that the public had an interest in the development of the road so that it might best serve the public and that, therefore, the condemnation was for a public use. The court said: "The ultimate purpose of defendant in error in the case at bar is the improvement of the New Haven & Derby Railroad, which 'connects (we quote from the opinion of the supreme court of errors, 77 Conn. 419, 59 Atl. 511) at New Haven, on the east, with four, and at its western terminals with two, important railroad lines owned by the plaintiff [defendant in error] and forms a link in an all-rail route between Boston and the West, which is the only one controlled by the plaintiff, and the only one of any kind controlled by it over which goods can be trans-

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<sup>11</sup> 201 U. S. 140.

<sup>12</sup> 203 U. S. 372.

ported with assured despatch in all weathers and at all seasons.' In this purpose the public has an interest, and to accomplish it the court applied the statute. The court observed: 'To develop this route so as best to serve the public interest requires the laying of additional tracks on the New Haven & Derby Railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of the stock of the lessee. They are owned by the defendant, who refuses to agree on terms of purchase.'"

*State of Georgia v. City of Chattanooga* <sup>13</sup> is authority for the proposition that a State may exercise its sovereign right of eminent domain with reference to lands within its borders which are owned by another State. In this case the court said: "The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister State owns the land for railroad purposes. Having acquired land in another State for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings."

The right of eminent domain may not be contracted away or surrendered in any other manner.<sup>14</sup>

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<sup>13</sup> 264 U. S. 472.

<sup>14</sup> *Pennsylvania Hospital v. Philadelphia* (245 U. S. 20); *Galveston Wharf Co. v. Galveston* (260 U. S. 473).

## CHAPTER C

### DUE PROCESS OF LAW AND THE POWERS SPECIFICALLY GRANTED TO CONGRESS

#### § 1225. General Considerations.

The requirement of due process of law imposed by the Fifth Amendment upon the United States is, in its application to the legislative powers of Congress, governed by the fact that the powers are expressly given to that body and, except as expressly qualified or limited by other provisions of the Constitution, are to be construed as plenary in character. This fact is of great importance for the reason that the principle is well established that, where a plenary regulative or controlling power is granted by the Constitution to a legislative body, there is authorized an incidental interference with private rights which may result from the rules and regulations which, in the exercise of that power, the legislature may see fit to establish. This principle follows from the fact that the power being constitutionally granted there can, of course, be no claim that, when exercised, the legislature is exceeding its powers. This does not mean, however, that the requirement of due process of law is to have no application. Upon the procedural side it has full application.<sup>1</sup> No one can be held civilly or criminally responsible under the legislatively created rules and regulations except in proceedings which satisfy the procedural requirements of due process of law. Furthermore, upon its substantive side, due process of law operates as a limitation through the application of the rule that the legislative power which is granted is one which must be reasonably and not arbitrarily exercised. But it still remains true that the grant of constitutional power opens up the subject to legislative regulation, and that, therefore, no claim can be made that the subject itself, as one involving private rights, is exempt from legislative regulation. However, the power to regulate, even though plenary, does not carry with it a right, under its guise, to enact legislation, the direct and primary purpose of which is to impair or destroy private, personal or property rights. And in general it is, of course, true that not every law, in form, or by legislative avowal declared to be, an exercise of a granted regulative power, is necessarily to be held to be such.

Thus in *Adair v. United States* <sup>2</sup> an act of Congress, alleged to be in regulation of interstate commerce, which rendered it a criminal offence for an officer of an interstate carrier to discharge an interstate employee

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<sup>1</sup> See Chapter XCI.

<sup>2</sup> 208 U. S. 161.



because of his membership in a trade-union, was held by the court not to be such, there being in its opinion no logical relation between the carrying on of interstate commerce and the membership or non-membership in trade-unions of the employees of the carrier companies.

So long, however, as the regulations prescribed have in fact a direct relation to the matters over which the legislative authority has been expressly extended, and do not attempt the direct taking of private property without compensation made, no question of a violation of due process upon its substantive side may be raised.

In *Knox v. Lee* (Legal Tender cases),<sup>3</sup> the court, referring to the provision of the Fifth Amendment with reference to due process, said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may incidentally bring upon individuals great losses; may, indeed, render valuable property valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be charged or a non-intercourse act or an embargo be enacted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. . . . But was it ever imagined this was taking private property without compensation or without due process of law?"

In the majority and dissenting opinions in the Sinking Fund cases,<sup>4</sup> decided in 1879, is to be found further discussion of the question as to the limitations imposed upon Congress by the due process of law requirement, and especially as to the bearing which this limitation has upon the impairment of contract obligations.

In this case, as will be remembered, the court upheld that part of the act of 1878 which established in the Treasury of the United States a sinking fund into which the plaintiff company was ordered to pay one-half of its earnings for services rendered the government, which fund was ultimately to repay the original loan by the United States to the company. The authority for this provision was found by the court in the right reserved by the United States to amend the charter which it had granted the company at the time the loan was made. The prevailing opinion was rendered by Chief Justice Waite. At the outset he admitted that: "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They [the United States] are not included

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<sup>3</sup> 12 Wall. 457.

<sup>4</sup> *Union Pac. Ry. Co. v. United States* (99 U. S. 700).

within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the land which they have given the corporation to aid in the construction of its railroad. Neither can they, by legislation, compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contracts already made in that connection. The United States are as much bound by their contracts as are individuals . . . all this is indisputable." As to the reserved right to amend the charter of the corporation, the court declared that "all agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession by contracts lawfully made;" but, after considering the general nature of a reserved right of charter amendment, the court said: "Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts which have already been made, but it may provide for what may be done in the future, and may direct what preparations shall be made for the due performance of contracts already entered into." The money earned by the company and retained by the government and placed in the sinking fund, it was declared, still remained the property of the company, and was to be devoted to the payment of debts owed by the company which could not, therefore, be said to be deprived of its property.

There can be no doubt that the court in this case strained almost to the breaking point the doctrine that there had been no taking of property because the action provided for was in the exercise of the right reserved to Congress to amend the charter which it had granted the company. Earnest dissenting opinions were filed by Justices Strong, Bradley and Field. Justice Strong, with reference to the general limitation upon the power of Congress to deal with private rights, said: "No power has been given to Congress to lessen the obligations of a contract between private parties by direct legislation except by the enactment of uniform laws on the subject of bankruptcy. Even a bankrupt law cannot be enacted applicable only to a single corporation or single debtors. To be constitutional it must be uniform throughout the United States. I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can, by direct action, otherwise than by a bankrupt law, even relieve a debtor to a private party of any duty he has assumed by his contract." Finally, Justice Strong

pointed to the fact, which has already been indicated, that a legislative act depriving an individual of a substantive right may be construed, as in fact, not a legislative measure but as a judgment. He said: "It may, I think, well be doubted whether the act of 1878 is even an attempted exercise of legislative power. A statute undertaking to take the property of A and transfer it to B is not legislation. It would not be a law. The act of Congress [of 1878] is little, if any more. It does not purport to be a law. It singles out two corporations, debtors of the government, by name, and prescribes for them, as debtors, new duties to their creditor. It then attempts to perform the functions of a court. This, I cannot but think, is outside of legislative action and power." So also, Justice Field in his dissent, declared the law in question to be in effect a judgment or decree, and as such beyond the legislative power of Congress. Both Justice Field and Justice Bradley agreed with Justice Strong that the act could not be justified under the power reserved to Congress to amend the charter of the railway company.

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## CHAPTER CI

### DUE PROCESS OF LAW AND THE POWER OF CONGRESS TO REGULATE INTERSTATE AND FOREIGN COMMERCE

#### § 1226. Federal Power Plenary in Scope.

That the power of Congress to regulate interstate and foreign commerce is plenary has been repeatedly declared. Thus, in *Southern Railway Co. v. United States*,<sup>1</sup> the court, holding that this control would authorize a regulation even of intrastate commerce when such regulation is incidentally necessary to the adequate and satisfactory control of interstate commerce, said: "And this is so not because Congress possesses any powers to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and the property of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it." <sup>2</sup>

#### § 1227. But Due Process of Law Required.

This case, and many other cases have been concerned with the extent of the Federal commercial power as regards the incidental effects of its exercise upon the reserved powers of the States. With this subject we are not now concerned, and the case has been referred to only as stating the accepted doctrine that the specifically granted power of Congress to regulate interstate and foreign commerce is plenary in the sense that it may take all forms which may be said to be truly regulatory of such commerce, and without regard to the fact that, incidentally, rights may be affected the direct control of which is not within the competence of Congress.

Applying this doctrine to private rights of property and contract, it is found that the limits to the power are determined by the same principle that governs when the rights of the States are concerned. This principle is that although an incidental interference with these private rights is justified, there is not authorized a direct impairment or destruction of these rights, even though this impairment or destruction be clothed in the form of an interstate commercial regulation. Thus, though Congress has the undoubted power to fix the maximum rates that may be charged by interstate carrier companies, the same rule which has been applied to State laws

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<sup>1</sup> 222 U. S. 20.

<sup>2</sup> This doctrine, as is well known, later received still more emphatic and comprehensive statement, especially in the matter of the fixing of railway rates.

declares that these maxima may not be made so low as to be actually confiscatory in effect. Nor, under the guise of an exercise of the commerce power may private property be taken without compensation made, or the title to it transferred from its owner to another person. In *Monongahela Navigation Company v. United States*<sup>3</sup> the court said: "Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment . . . Congress has supreme control over the regulation of commerce, but, if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it will either agree upon the price with the owner, or in condemnation pay just compensation therefor. . . . So, coming to the case before us, while the power of Congress to take this property is unquestionable [that is, under its interstate commerce power] yet the power to take is subject to the constitutional limitation of just compensation." The court then added: "It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire."

The possibility here indicated of a difference between the affirmative taking of private property for a public use, and its destruction in pursuance of a regulation of Congress is, in fact, a fundamental one, for, in the one case, property rights are directly destroyed and, in the other, they are only indirectly or incidentally, though possibly substantially, affected.

In *United States v. Trans-Missouri Freight Association*<sup>4</sup> the court held that the Anti-Trust Act of 1890 prohibited all contracts in restraint of interstate trade, whether reasonable or unreasonable, and this construction was held not to invalidate the act as depriving persons of either liberty or property without due process of law. In fact, the constitutionality of the act as thus construed was not questioned in either the majority or minority opinions.

In *United States v. Joint Traffic Association*<sup>5</sup> this construction of the act was reaffirmed. Here, however, the power of Congress to provide regulation of commerce which should so restrict the freedom of contract of shippers and carriers was discussed by the court. "Where the grantees of this public franchise," the court declared, "are competing railroad companies for interstate commerce, we think Congress is competent to forbid

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<sup>3</sup> 148 U. S. 336.

<sup>4</sup> 166 U. S. 290.

<sup>5</sup> 171 U. S. 505.

any agreement or combination among them by means of which competition is to be smothered. . . . The prohibition of such contracts may, in the judgment of Congress, be one of the reasonable restrictions for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief." And later, in answer to the specific objection that such a prohibition is in violation of the rights reserved to individuals by the due process provision of the Fifth Amendment, the court said: "Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts, which, while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the States, or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof. The question is, for us, one of power only. We think the power exists in Congress, and that the statute is, therefore, valid."

In *Addyston Pipe & Steel Co. v. United States*<sup>6</sup> the constitutionality of the act of 1890 as tested by the due process of law requirement was again examined in the first paragraph of the opinion. The Joint Traffic Association case related to contracts of railroads which, as performing public services, and as enjoying public franchises, might be held to be peculiarly subject to legislative regulation. In the *Addyston Pipe* case, however, the agreements involved were between private manufacturing and trading companies. This distinction was, however, held without constitutional significance so far as the commercial powers of Congress were concerned. "Under this grant of power to Congress," said the court, "that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. And when we speak of interstate we also include in our meaning foreign commerce. We do not assent to the correctness of the proposition that the constitutional guarantee of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned." And later the court said, that, so far from the Fifth Amendment operating as a limitation upon the commercial power of Congress, "the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution." And, finally, the court declared: "The power of Congress over the subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Con-

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<sup>6</sup> 175 U. S. 211.

gress, because the direct results of such contracts might be the regulation of commerce among the States possibly quite as effectually as if a State had passed a statute of like tenor as the contract. The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation to some extent of a subject which, from its general and great importance, has been granted to Congress as the proper representative of the nation at large."

In *Champion v. Ames*<sup>7</sup> the court dismissed the argument that the law prohibiting the transportation of lottery tickets in interstate commerce is a violation of the due process of law clause of the Fifth Amendment with the simple assertion: "But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals."<sup>8</sup>

Here it is clear that the question as to the exclusion of an article from interstate commerce, irrespective of its character, was not raised or decided. To the writer it would appear, however, that should this arbitrary exclusion be provided for by an act of Congress no objection, founded upon a denial of due process, could be raised. That is, if it should be decided that such an exclusion could fairly be said to be a "regulation" of such commerce, that decision would be decisive in the light of the cases earlier mentioned. In fact, to the writer it would seem that the exclusion of the lottery tickets was, essentially speaking, an arbitrary one, so far as the regulation of commerce was concerned, for the Federal Government had confessedly no authority to declare lotteries illegal as such, and, though the tickets were spoken of as "polluting" interstate commerce, it is impossible to see that such was, or could, in fact, be the case.<sup>9</sup>

The four dissenting justices in the Lottery case did not found their disagreement with the majority upon the ground that due process of law was denied by the law in question.

In *Howard v. Illinois C. Ry. Co.*<sup>10</sup> the constitutionality of an act of Congress in regulation of the liabilities of interstate carrier companies was considered. The act was held void on the ground that, by its terms, it was made applicable to other employees than those injured while engaged in

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<sup>7</sup> 138 U. S. 321.

<sup>8</sup> Whether this is a satisfactory agreement is examined in § 582.

<sup>9</sup> Somewhat analogous to the question of the limitation of the commercial power of Congress by the due process of law provision is that as to authority through the exercise of that power to deprive or abridge such Federal rights of individuals as of free intercourse, and to go to the seat of government, which rights, of course, belong to citizens and not to corporations. *Bank of Augusta v. Earle* (13 Pet. 519). That the rights of free intercourse and of coming to the seat of government to assert any claim that one may have upon it or to transact any business that he may have with it are rights inhering in the status of Federal citizenship, see *Crandall v. Nevada* (6 Wall. 35).

<sup>10</sup> 207 U. S. 463.

interstate commerce. The majority, therefore, did not find it necessary to consider specially the validity of the law as tested by the requirement of due process. They did, however, hold that the liability of the carrier companies to their employees for injuries received is a matter relating to interstate commerce and, therefore, generally speaking, subject to regulation by Congress legislating under its commercial power. The subject was, however, considered by Justice Moody in the elaborate dissenting opinion which he filed. He there said: "The powers of Congress are not only confined to those which may be inferred from the Constitution, but are also restrained by the express limits upon their exercise which are contained in the instrument. They are delegated and enumerated, and then limited. Even when Congress enters upon a field in which it rightfully exercises the supreme governmental power, it is not supreme in the fullest sense . . . all its legislation must obey the express commands of those parts of the Constitution which mark a limit beyond which legislation cannot go. The only limit upon the authority of Congress relevant to the discussion of this branch of the case is that which forbids Congress from depriving any person of his life, liberty or property without due process of law."

Justice Moody then went on to point out that the act in question modified common-law doctrines with reference to the liabilities of carrier companies in four ways, to wit: (1) that damages were recoverable for death as well as for injuries; (2) that the fellow-servant doctrine was practically abolished; (3) that the defence of contributory negligence was taken away; and (4) that the right of the employee to contract away his right in case he receives injuries in the course of his employment was denied. As to the constitutionality of the first three of these provisions, Justice Moody said he has no doubt.<sup>11</sup> As to the fourth change in the common law, namely, that denying to employees a right to enter into contracts releasing their employers from liability arising from their own negligence, Justice Moody said that it was "open to a possible objection not common to the others," to wit, as violating freedom of contract protected by the Fifth Amendment. As to this, however, he simply observed: "It is enough to say that that

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<sup>11</sup> They are simply "rules of law, unprotected from the Constitution from change and, like all other such rules, must yield to the supreme authority of a statute. They have so generally been modified by statute that it may well be doubted if they exist in their integrity in any jurisdiction. The common law rules have taken form through the decisions of the courts, whose judges, in announcing them, were controlled by their views of what justice and sound public policy demanded. . . . But the economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well settled doctrines of law, have no constitutional sanctity. They are binding upon succeeding judges but, while they may influence, they cannot control legislatures. Legislators have their own economic theories, their own views of justice and public policy; and their views, when embodied in a written law, must prevail."



part of the statute is separable from and independent of the remainder and may stand or fall by itself, and that no question concerning it is raised in these cases.”

The constitutional doubt which Justice Moody thus stated would seem, in the light of the other decisions of the court, to be one not well taken, for, the only constitutional requirements of a law enacted by Congress in the exercise of its commercial power are: first, that it is, in fact, in regulation of interstate commerce; and second, that individual rights are only incidentally abridged or destroyed.

In *Adair v. United States*<sup>12</sup> we have an instance in which an act of Congress passed in pursuance of its commercial powers was held unconstitutional as in violation of the due process of law clause of the Fifth Amendment. The law under review was one which, *inter alia*, prohibited agents of interstate carrier companies from requiring of any employees, as a condition of continued employment, or of anyone seeking employment as a condition of employment, to enter into an agreement not to become or remain a member of a labor union; such agents were also by the law forbidden to threaten any employee with loss of employment, or in any way to discriminate against him because of his membership in a labor organization. This provision the court held could not be sustained as an exercise by Congress of its power to control interstate commerce for the reason that, as the court said, they could perceive no logical relation between membership or non-membership in a labor union of the employees and the performance by them of their duties. “We hold,” the court said, “that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part.”

Since the commerce power was the sole source whence it was claimed that Congress had the power to provide the legislation in question, it is apparent that the fate of the law, or at least this provision of the law, was sealed. Rather unnecessarily, however, the court first examined the question whether the prohibition in question was a violation of due process of law, and then, upon upholding that it was, went on to examine whether, notwithstanding its infringement upon the liberties of individuals and corporations, it might yet be upheld as in exercise of the authority expressly given to Congress to regulate commerce. By this order of argument, however, the court made fairly evident its view that, could the provision in question have been fairly found to be a regulation of commerce, it would have been valid even though it were a limitation upon the ordinary rights of contracting which come within the protection of the Fifth Amendment.

In *Atlantic Coast Line R. Co. v. Riverside Mills*<sup>13</sup> the court upheld as

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<sup>12</sup> 208 U. S. 161.

<sup>13</sup> 219 U. S. 186.

valid the so-called "Carmack Amendment" of June 29, 1906, to the Interstate Commerce Act of 1887, making interstate carriers voluntarily receiving property for transportation to another State liable to the holder of the bill of lading for any loss occurring anywhere en route, that is, whether upon its own lines or those of a connecting carrier, with, however, in the latter case, a right of recovery over against the carrier actually causing the loss. The court admitted that the effect of this provision was to deny to the initial carrier a freedom to enter into a contract limiting its liability, but said: "It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect to those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute, except as limited by other provisions of the Constitution itself.

"Having the express power to make rules for the conduct of commerce among the States, the range of congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful, is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed. 'The test of power,' said Mr. Justice White, speaking for this court in the Employers' Liability cases, cited above, 'is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant [of power] conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce.'" Later, the court said: "This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We therefore refrain from any consideration of the large question thus suggested. The shipments involved in the present case were voluntarily received by an initial carrier who undertook to escape carrier's liability beyond its own lines by a provision limiting liability to loss upon its own line. This was forbidden by the Carmack Amendment, and any stipulation and condition in the special receipt which contravenes the rule in question is invalid."

When this large question, which the court referred to in *Atlantic Coast*

Line R. Co. v. Riverside Mills is reached, it may be predicted that the court will hold that a carrier may, if Congress deems it a proper regulation of interstate commerce, be compelled to accept shipments to which may be applied the liabilities created by the Carmack Amendment. This liability, the court declared, is not one that compels the initial carrier to pay the debt of an independent connecting carrier. "The liability of the receiving carrier which results in such a case is of a principal for the negligence of his own agents."

In the so-called Commodities case <sup>14</sup> the court, because of the construction which it gave to the act of Congress before it, found it necessary to consider the contention against its validity based upon the due process of law clause of the Fifth Amendment. As to this contention the court said: "When, however, mere forms of statement are put aside and the real scope of the argument at hand is grasped, we think it becomes clear that, in substance and effect, the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibition, which, it is insisted, could not be exerted in virtue of the authority to regulate. The wide support upon which the propositions rest hence disappears as a result of the construction which we have given the statute."

In Louisville and Nashville R. R. Co. v. Mottley <sup>15</sup> we have what is perhaps the most extreme application which the court has been called upon to give of the doctrine that Congress, in the exercise of its expressly granted authority to regulate interstate commerce, may incidentally override and destroy private rights of contract and property. In this case the court, pursuing the terms of the act of June 29, 1906, prohibiting a carrier from collecting or receiving "a greater or less or different compensation" for the transportation of persons or property than that specified in its published schedule of rates, held that an agreement entered into by a carrier to issue certain annual passes for life in consideration of a release of a claim for damages was unenforceable even though the agreement had been entered into prior to the passage of the act of 1906 and was, therefore, at that time valid. The effect of this decision was, of course, absolutely to deprive the defendant in error of his property rights under that contract. The authority of Addyston Pipe and Union Bridge Company cases was held controlling. "The agreement between the railroad company and the Mottleys," the court said, "must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to make the agreement unenforceable, or to impair its value."

In Chicago, B. & Q. R. R. Co. v. United States <sup>16</sup> the court upheld the

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<sup>14</sup> United States v. Delaware & Hudson Co. (213 U. S. 366).

<sup>15</sup> 219 U. S. 467.

<sup>16</sup> 220 U. S. 559.

validity of various acts of Congress with reference to the use by interstate carriers of safety devices, even though these acts were construed to impose upon the carriers an absolute duty which was not discharged by the exercise of reasonable care and diligence. This doctrine had earlier been declared by the court in civil proceedings in *St. Louis, I. M. & S. R. v. Taylor*,<sup>17</sup> and in this later case an action brought by the United States to recover a penalty prescribed for the violation of the laws in question was held not to be a criminal action and, therefore, not to be distinguished from the earlier case.

In *Louisville & N. R. Co. v. Central Stock Yards Co.*<sup>18</sup> a provision of the Constitution of the State of Kentucky which sought to compel carrier companies to surrender loaded freight cars to another company in order to facilitate shipments to points on the line of that company, was held void as in denial of due process of law because no adequate provision was made for compensating the owner for the use of the cars and guaranteeing him against possible loss. This failure so to provide for adequate compensation, the court held, could not be cured by providing for it in the judgments under the clause. "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." It was, however, suggested that the silence of the Constitution might possibly be remedied by a legislative act, if such an act were held by the State courts to be warranted by the State Constitution.

The doctrine thus declared would of course be applicable to acts of Congress in regulation of interstate and foreign commerce.

In *Michigan Central R. Co. v. Michigan Railroad Commission*<sup>19</sup> it was held that due process of law was not denied by a requirement that a carrier should permit empty or loaded cars owned by it to be hauled from its line upon a connecting line for purposes of loading or delivery of freight, and that cars of other carriers, loaded with freight, and consigned to points on connecting lines, should be hauled from its line upon connecting lines for purposes of delivery. The insistence that property is taken without due process of law by such requirement, or similar requirements, said the court, involves the fundamental error that it overlooks the fact that railroads, though private undertakings, are devoted to a public use, and, therefore, subject to reasonable regulation by the State.

### § 1228. The Adamson Act and Due Process of Law.

The extent to which Congress, in the exercise of its power to regulate interstate commerce may invade the field of private rights of property and contract was strikingly illustrated in *Wilson v. New*<sup>20</sup> in which was sustained the constitutionality of the Adamson Act<sup>21</sup> of 1916. This case has

<sup>17</sup> 210 U. S. 281.

<sup>20</sup> 243 U. S. 332.

<sup>18</sup> 212 U. S. 13.

<sup>21</sup> 39 Stat. at L. 721.

<sup>19</sup> 236 U. S. 615.

been earlier examined as to its holding that the provisions of the law were constitutional as being in regulation of interstate commerce. The case has now to be considered, however, as to its bearing upon due process of law, its regulatory character as regards interstate commerce being granted.

The act provided that, in contracts between the railroads and their employees eight hours should be deemed a day's work, and that, pending a report of a commission of inquiry to be appointed, the compensation of the railway employees for such a standard day's work should not be reduced below the then existing standard day's wage, and that for hours of labor in excess of eight hours a day, there should be a pro rata increase of pay. It is thus seen that, though denominated an eight-hour law, it was not such (since it did not forbid laborers being worked more than that number of hours a day), but that it was a law fixing the rates of wages to be paid. As to this it is, however, to be observed, that the law did not operate to interfere with existing contracts, for there were none, the railways and their employees having failed to come to an agreement as to wages to be paid, and it was this failure, and the impending cessation of work by the laborers with a resulting interference with interstate commerce, which had created the emergency which the law sought to meet. In substance and effect, then, as declared by Chief Justice White in his opinion in the case, the act was one of compulsory arbitration, and determination thereunder of the issues, by Congress. This determination, however, so far as the rate of wages was concerned, was not to be a permanent one, but a temporary one which left the parties free, at the end of the period provided for, to come to an agreement by an exercise of their own wills. "It certainly cannot be said," declared the Chief Justice, "that the Act took away from the parties, employers and employees, their private right to contract on the subject of a scale of wages since the power which the Act exerted was only exercised because of the failure of the parties to agree and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right."<sup>22</sup>

Four justices dissented in this case. One of these, Justice McReynolds, said that he could not view the act as within the authority granted to Congress by the Commerce Clause, but that, if it were to be so viewed, it would follow that Congress could fix a maximum as well as a minimum wage for trainmen, and require compulsory arbitration of labor disputes which would seriously and directly jeopardize the movement of interstate traffic. Two of the other three dissenting justices agreed with Justice McReynolds that the act should not be regarded as coming within the power of Congress to regulate interstate commerce, but all three of them agreed that, aside from this constitutional defect, the act was in violation of due process of

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<sup>22</sup> There was no contention made by the railroads that the act would in its effects be confiscatory of their property.

law.<sup>23</sup> The argument upon this point was embodied not only in the dissenting opinion filed by Justice Pitney and concurred in by Justice Van Devanter, but also in the separate dissenting opinion of Justice Day. In his opinion Justice Day pointed out that the effect of the act was to increase the pay of certain employees and thus gave a plain illustration of the taking of property from one person and giving it to another by legislative fiat—a taking which it had been declared in *Davidson v. New Orleans*<sup>24</sup> could not constitutionally be done. This being the fact, he said, no emergency could justify it. “No doctrine involving more pernicious consequences,” he said, quoting from *Ex parte Milligan*,<sup>25</sup> “was ever invented by the wit of man, than that any of its [the Constitution’s] provisions can be suspended during any of the great exigencies of government.”<sup>26</sup>

Justices Pitney and Van Devanter denied that a failure to agree could be treated as a waiver of the right of parties freely to contract, but that, upon the contrary, it was as much an exercise of the right as was the making of an agreement. Nor did these justices find any saving grace in the law in the fact that the rates provided for by it were to be for only a limited period. “The logical consequences of the doctrine now announced are sufficient to condemn it. If Congress may fix wages to trainmen in interstate commerce during a term of months, it may do so during a term of years, or indefinitely. If it may increase wages, much more certainly it may reduce them. If it may establish a minimum it may establish a maximum. If it may impose its arbitral award upon the parties in a dispute about wages, it may do the same in the event of a dispute between the railroads and the coal-miners, the car-builders, or the producers of any other commodity essential for the proper movement of traffic.”

The foregoing views of the minority have been given since they serve to show the full significance of the decision of the court. Whether or not one is able to bring this decision into harmony with earlier cases has a bearing only upon the record of the court for logical consistency. The fact is that this case carried into new fields the regulatory powers of Congress under its commerce authority, and marked what is perhaps the most advanced position which the court has taken with regard to the extent to which Congress, in the exercise of its power to regulate commerce may, without denying due process of law, control the use of private property, and limit the freedom of individuals to contract. As to this it is to be observed that no question of police regulation was involved since there was no claim that the safety or convenience or efficiency of interstate trans-

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<sup>23</sup> As to the unconstitutionality of laws fixing the wages of adult laborers, see § 1173.

<sup>24</sup> 96 U. S. 97.

<sup>25</sup> 4 Wall. 2.

<sup>26</sup> In the majority opinion, Chief Justice White said: “Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”

portation was involved in the legislative determination of the wages to be paid to the trainmen.

How far the doctrine of the case will in the future be confined to cases of great emergencies remains yet to be seen. In *Wolff Packing Co. v. Court of Industrial Relations*,<sup>27</sup> the court said that the case of *Wilson v. New* could not be relied upon in the instant case because in that case there was not present that great temporary public exigency recognized by all and declared by Congress which had been present when the Adamson Act had been enacted.

One final point in definition of the commercial powers of Congress requires to be made. This is that so far as due process of law is concerned, the regulative power which Congress possesses over interstate commerce is the same, no more and no less, than that which the States or their legislatures have over commerce within their respective borders. It would thus follow that all those cases in the Supreme Court in which State laws in regulation of intrastate commerce have been upheld as legitimate exertions of the States' police powers, are authority for sustaining similar legislation by Congress with reference to interstate commerce.

#### § 1229. Congressional Control of Navigation.

Intimately connected with the power of Congress to regulate interstate and foreign commerce is its authority to control navigation. The following cases may, therefore, be mentioned in which the bearing of due process upon this power is discussed.

In *Scranton v. Wheeler* <sup>28</sup> it was held (quoting from the syllabus) that "a pier erected by the United States, on land submerged under navigable waters, the title to which was owned by the riparian proprietor, when this was done merely for the improvement of navigation, though it permanently destroyed his access to the navigable waters, did not entitle him to any compensation under the Fifth Amendment . . . since the title to the land, whether owned by the riparian owner or by the State, was acquired subject to the rights which the public have in the navigation of such waters." To the argument that compensation should be made for the loss to the plaintiffs resulting from the occupancy of the submerged lands, the court said that "there is not, within the meaning of the Constitution, a taking of private property for a public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case, 'in due subjection to the rights of the public'—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public."

It must be said that *Scranton v. Wheeler*, and the *Yates* case (*Yates v. Milwaukee*, 10 Wall. 497), were extreme cases as regards the disregard

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<sup>27</sup> 262 U. S. 544.

<sup>28</sup> 179 U. S. 141.

shown by them of private party rights, and that, in them, the court seems to take a more restricted view as to the nature of property, of which one may not be deprived without due process of law, or without due compensation made, than it had taken in other cases.

In a series of cases dealing with the constitutionality of acts of Congress providing for the construction of aids to navigation and interstate commerce and for the removal of obstructions thereto, the Supreme Court has held that the acts were not in violation of due process of law by reason of the fact that private property rights were thereby incidentally injuriously affected. Thus in *Gibson v. United States*<sup>29</sup> with reference to a dike which was constructed under congressional authority which substantially destroyed the landing on and in front of a privately owned farm, and thus prevented during most of the year egress from and ingress to such farm to or from the navigable channel of the river, with the acknowledged result that the value of the farm had been greatly reduced, the court held that the owner had no right to damages.<sup>30</sup> In *Union Bridge Co. v. United States*<sup>31</sup> it was held that the requirement by the Secretary of War, under congressional authority, that a private company should make alterations at its own expense of a bridge owned by it in order that the navigability of the stream flowing under it might be improved, did not amount to a taking of property without due process of law, although the bridge in its unaltered form had been lawfully constructed.<sup>32</sup> The court said: "The damage which will accrue to the Bridge Company, as result of compliance to the Secretary's order, must, in such case, be deemed incidental to the exercise by the government of its power to regulate commerce among the states. . . . An order to so alter a bridge over a water-way of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made."

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<sup>29</sup> 166 U. S. 269.

<sup>30</sup> This *Gibson* case was referred to with approval in *Scranton v. Wheeler* (179 U. S. 141), and *C., B. & Q. R. Co. v. Illinois* (200 U. S. 561).

<sup>31</sup> 204 U. S. 364.

<sup>32</sup> *Cf. Cincinnati, Indianapolis & Western R. Co. v. Connersville* (218 U. S. 336); *Chicago, Milwaukee & St. P. R. Co. v. Minneapolis* (232 U. S. 430); *Lake Shore & Mich. S. R. Co. v. Clough* (242 U. S. 375).



## CHAPTER CII

### DUE PROCESS OF LAW AND STATE TAXATION

The taxing powers of the States of the Union are without limits save those which are imposed by their own Constitutions or by the Federal Constitution. The restraints imposed by the State Constitutions necessarily vary in the different States and will not be considered in this treatise since they fall outside the sphere of Federal constitutional law.

Some of the limitations upon the taxing powers of the State imposed by the Federal Constitution are express; others are implied. Most of the implied limitations are dealt with in other chapters in which are discussed the express constitutional provisions which, by implication, place restraints upon the States with reference to their powers to tax.

The express limitations laid upon the States' taxing powers with reference to imposts and duties on imports or exports and to tonnage duties have been dealt with in connection with the discussion of Interstate and Foreign Commerce.

There remains, then, to be considered in the present and following chapters the limitations upon the States' taxing powers arising from the equal protection of the laws and due process of law clauses of the Fourteenth Amendment and, possibly distinguishable from the requirement of this latter clause, the limitations arising from the fact that the jurisdictional authority of the States is strictly confined to their own several areas, in this respect differing from wholly sovereign States.<sup>1</sup>

#### § 1230. Due Process of Law and Taxation.

In *Davidson v. New Orleans* <sup>2</sup> the Supreme Court after considering the meaning of the phrase "due process of law" as employed in the Fourteenth Amendment, and after adverting to the difficulty of stating affirmatively and completely the protection afforded by it, went on to say that they could at least state some of the cases which do not fall within its application, and among these, they said, "we lay down the following propositions as applicable to the case before us: that whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide

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<sup>1</sup> Cf. Willoughby, *Fundamental Concepts of Public Law*, Chap. XXIV.

<sup>2</sup> 96 U. S. 97. This case was with reference to the taxing powers of the States, but the doctrines laid down apply equally to the taxing powers of the Federal Government.

for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It may violate some provision of the State Constitution against unequal taxation, but the Federal Government imposes no restraints on the States in that regard. . . . It is said that plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract."

From the foregoing it is apparent that the taking of private property in the form of taxes is not, in itself, a taking of private property without due process of law because no direct compensation is made for the property thus taken. Though the taking of the property in the form of a tax is thus not in itself a taking without due process, it may become such by reason of the purpose for which, or the manner in which, the tax is levied, assessed and collected.

Due process of law obliges the United States as well as the individual States, in the exercise of their taxing powers, to conform to the following rules:

1. That the tax shall be for a public purpose.
2. That it shall operate uniformly upon those subject to it.
3. That either the person or the property taxed shall be within the jurisdiction of the government levying the tax.
4. That in the assessment and collection of the tax certain guarantees against injustice to individuals, especially in the case of specific as distinguished from *ad valorem* taxes, by way of notice and opportunity for a hearing, shall be provided.

### § 1231. Taxation Must Be for a Public Purpose.

A tax being in the eyes of the law an enforced contribution upon persons or property to raise money for a public purpose, it follows that where this public purpose is absent, the contribution sought to be enforced cannot be justified as a tax but amounts to an attempt to take property without due process of law. The validity of this proposition is beyond dispute, but judicial records furnish comparatively few instances of tax levies being held void for this reason. This is due, in the first place, to the fact that not often do the laws expressly state the purpose for which a tax is levied; and,

in the second place, where this purpose is stated, the courts will, in deference to the legislative judgment, construe the purpose to be a public one if it is possible to do so. In *Broadhead v. City of Milwaukee* <sup>3</sup> the Supreme Court of Wisconsin said: "To justify the court in arresting the proceedings and declaring the tax void the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable to every mind at the first blush."

In *Loan Association v. Topeka* <sup>4</sup> the court seemed to deduce the constitutional invalidity of laws levying taxes for private purposes from an assumed inherent limitation upon legislative power in "free governments," such as that of the United States, rather than from the specific provisions in the Federal Constitution with regard to due process of law. Thus the court in that case declared that there are certain "rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism. . . . To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less robbery because it is done under the form of law called taxation."

It is certain that, at the present time, no such argument would be made in order to invalidate a tax levied for a private purpose, but that, instead, the invalidating source would be found in the due process of law provisions of the Federal and State Constitutions. It is to be observed that at the time the *Loan Association* case was decided—in 1874—the possibilities inherent in the constitutional requirement regarding due process of law had not been perceived by the courts. Even Justice Clifford, who perceived the impropriety upon the part of the courts of nullifying a law "on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction," and who therefore dissented from the judgment in the case, did not consider whether such a restriction might not be found in the due process clause of the Fourteenth Amendment.<sup>5</sup>

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<sup>3</sup> 19 Wis. 624.

<sup>4</sup> 20 Wall. 655.

<sup>5</sup> In *Fallbrook Irrigation District v. Bradley* (164 U. S. 112), the court explained the reasoning employed in the *Loan Association* case by saying: "There had been [in that case] no decision of the highest State court upon the question whether the act violated the Constitution of Kansas, and consequently was none to be followed by the Federal court upon that question. This court held that a law taxing the citizen for the use of a private enterprise conducted by other citizens was an unauthorized invasion of private right. Mr. Justice Miller said that there were such rights in every free government which were beyond the control of the State. The ground of the decision was as stated:

The case of *Loan Association v. Topeka* involved a law which, while not itself levying a tax, authorized towns to issue bonds payable to private manufacturing companies to encourage and aid them in establishing their plants within their respective limits. It was held by the court that inasmuch as taxes would have to be levied for the payment of these bonds, the law in effect attempted to authorize the towns to levy taxes in aid and encouragement of a private enterprise and was, therefore, void. In its opinion the court said: "The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their Constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. *State v. Wapello*, 13 Iowa, 388; *Hanson v. Vernon*, 27 Ia. 28; *Sharpless v. Mayor*, 21 Pa. St. 147; *Whiting v. Fond du Lac*, 25 Wis. 188. In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies by counties as valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by

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that the act took the property of the citizen for a private purpose, although under the form of taxation. In thus holding, there was no overruling or refusing to follow the decisions of the highest court of the State respecting the Constitution of its own State." The fact is, however, that the restricting clause in the Constitution of the State of Kansas does not appear to have been relied upon in the *Loan Association* case. In the *Fallbrook* case the court gave its full approval to the doctrine declared by Justice Clifford in his dissenting opinion in the *Loan Association* case, when it said "there is no justification for the Federal courts to run counter to the decisions of the highest State courts upon questions involving the construction of State statutes or Constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law." And it is to be observed that the *Fallbrook* case was decided upon the theory that the taking of private property for private purposes by a State in the exercise of any of its powers is forbidden by the Fourteenth Amendment."

taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for the purpose of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand, it was said that roads, canals, bridges, navigable streams and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character, because constructed by private enterprise, aggregated into a corporation. We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

As late as 1905 we find a doubt expressed by Justices Holmes, Brewer and Peckham, and Chief Justice Fuller whether the due process of law provision of the Fourteenth Amendment might be relied upon as a reason for invalidating taxes for other than public purposes. Thus, in a dissenting opinion in *Madisonville Traction Co. v. St. Bernard Mining Co.*<sup>6</sup> we find these justices, speaking through Justice Holmes, saying: "I am not aware of any limitations in the Constitution of the United States upon a State's power to condemn land within its borders, except the requirement as to compensation. All that was decided in *Loan Association v. Topeka*, and *Cole v. LaGrange*,<sup>7</sup> was that the Constitutions of certain States did not authorize the taking of private property for a private use. But if those decisions had rested on the Fourteenth Amendment, which they were not,

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<sup>6</sup> 196 U. S. 239.

<sup>7</sup> 113 U. S. 1.

and in my opinion could not have been, I do not perceive that they would have any bearing upon what I have said or upon the case at bar.”<sup>8</sup>

This statement, it is seen, refers specifically to the taking of property under the right of eminent domain, but it is clear that if, from the viewpoint of the Fourteenth Amendment, the matter of public purpose be immaterial in cases of the exercise of the right of eminent domain, the same would be true in cases of taxation, except, perhaps, for the fact that the Supreme Court has, in eminent domain cases, taken a more liberal view as to what constitutes a public purpose than it has in taxation cases.

However this may be, there have been cases in the Supreme Court since 1905 which have clearly established the doctrine that a tax will be held void if its specific purpose be the raising of revenue for other than a public purpose.<sup>9</sup> Thus in *Jones v. Portland*,<sup>10</sup> decided in 1917, we find the court deeming it a proper ground for contesting the validity of a State law that it would require the expenditure for other than a public purpose of moneys obtained by taxation. In that case the State law under examination was one which authorized cities or municipalities in the State to establish and maintain wood, coal and fuel yards for the purpose of selling, at cost, fuel to their inhabitants. The Supreme Court, citing *Loan Association v. Topeka* as authority for the proposition, said: “The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State.”<sup>11</sup>

<sup>8</sup> In the case at bar only certain procedural questions were involved.

<sup>9</sup> Of course in most cases no specific purpose is mentioned as a reason for the levying of taxes. As to the latitude allowed the States and the Federal Government in the matter of appropriating funds from their several treasuries, see *ante*, § 62.

<sup>10</sup> 245 U. S. 217.

<sup>11</sup> As to the public purpose present in the maintaining of yards for the sale of fuel at cost to the people, the Supreme Court, quoting with approval from a decision of the State court (*Laughlin v. Portland*, 111 Me. 486) said: “The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost), nor for the sake of the indirect gains that may result to purchasers through reduction in price by government competition. It is simply to enable the citizen to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which would otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole.”

The State court in its opinion also pointed to the fact that the service to be extended to the public by the act was no different in essential character to the supplying to them by governments of light, water, or heat from central municipal plants. The court said: “Can it make any real and vital difference and convert a public into a private use that, instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat, and then conducting it in the one case by wires and in the other by pipes to the user’s home, the coal itself is hauled over the same highways to the same point of distribution?”

In *Green v. Frazier* <sup>12</sup> decided in 1920, the court, while upholding the State laws in question, again found it material to consider whether the purpose of the State expenditures authorized by these laws was a public one and, therefore, not invalid as a taking of the taxpayers' property without due process of law. In this case the State had proposed to raise by taxes and by bonds money to establish a State bank, State warehouses, State elevators, and State home building associations which were to buy, sell and lease homes to citizens of the State. The Supreme Court, affirming a decree of the State court which had sustained a demurrer to a taxpayer's suit to enjoin the enforcement of the laws, said: "The due process of law clause contains no specific limitation upon the right of taxation in the States, but it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes." <sup>13</sup>

The opinion concluded: "Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision."

### § 1232. Taxation and the Procedural Requirements of Due Process of Law.

With reference to all forms of taxation it is necessary that the procedural requirements of due process be satisfied. This has never been doubted. Stating affirmatively these requirements, the court, in *Davidson v. New Orleans* <sup>14</sup> said: "Whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden is imposed upon property for a public use, whether it be of the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or of contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other provisions."

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<sup>12</sup> 253 U. S. 233.

<sup>13</sup> Citing *Fallbrook Irrigation District v. Bradley* (164 U. S. 155). In that case the court said: "It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under State authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government."

<sup>14</sup> 96 U. S. 97.

### § 1233. Notice and Opportunity to Contest.

Due process of law requires that in the case of an *ad valorem* tax an opportunity shall be given the taxpayer to appear and give evidence as to the proper valuation of the property which is assessed.<sup>15</sup> In other cases, however, no notice or opportunity for hearing need be given the taxpayer. In *Hagar v. Reclamation District* <sup>16</sup> the court said: "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

<sup>15</sup> Or, if it be a special assessment for the purpose of some public improvement, as to whether the property in question is properly included within the assessment.

<sup>16</sup> 111 U. S. 701.



**§ 1234. Hearing before Administrative Tribunal Sufficient.**

It is not necessary that the hearing thus required in the case of *ad valorem* taxes should be before a court of justice. The hearing may be had and, in fact, is usually had, before an administrative board whose action in this respect is judicial in character and whose determinations may be final and conclusive in the matter. Thus, for example, by Section 2930 of the Revised Statutes, it is provided that in the matter of appraisement of imports an appeal shall be allowed the importer from the collector of customs to "one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants," but that "if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly." Provision is, however, made for relief in cases where the collectors have acted fraudulently or upon a principle not sanctioned by law, or where they have in any way transcended the powers given them by Congress.

In *Hilton v. Merritt*<sup>17</sup> the constitutionality of these provisions was upheld. In *Auffmordt v. Hedden*<sup>18</sup> the court said: "Nor is there anything in the objection that Section 2930 of the Revised Statutes is unconstitutional in making the decision of the appraisers final, and that the plaintiffs had a right to have the question of the dutiable value of the goods passed upon by a jury. As said before, the government has the right to prescribe the conditions attending the importation of goods upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final; and it has been held by this court, in *Arnson v. Murphy* (109 U. S. 238), that the right to bring such a suit is exclusively statutory, and is substituted for any and every common-law right. The action is, to all intents and purposes, with the provision for refunding the money if the importer is successful in the suit, an action against the government for moneys in the treasury. The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector."

In this case it was held that it was not necessary, and that it had not been the intention of Congress that the hearing before the appraisers or collector should be characterized by all the formalities of a court of law, but that the proceedings might, and from necessity would generally have to be of a summary character. The court thus held that due process of law had not been denied because the importer or his agent had been practically excluded from the hearing upon the reappraisement, that he had not been permitted to confront the opposing witnesses by testimony on his own behalf, or allowed the aid of counsel. "No government," said the court,

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<sup>17</sup> 110 U. S. 97.

<sup>18</sup> 137 U. S. 310.

"would collect the revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail."

### § 1235. Character of Hearing Required in Taxation Proceedings.

In *McMillen v. Anderson* <sup>19</sup> it was held that due process does not demand that a person shall be given an opportunity to be personally present when a tax is assessed against him. And in *Bell's Gap R. R. Co. v. Pennsylvania* <sup>20</sup> it was pointed out that in the collection of taxes there is not required that there should be the same sort of notice as is demanded in suits at law, or even such as are deemed necessary in the exercise of the power of eminent domain. "It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." And in *Turpin v. Lemon* <sup>21</sup> the court said: "Laws for the assessment and collection of general taxes stand upon a somewhat different footing [from those governing the exercise of the power of eminent domain], and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary."

The matter of the notice required in the case of "special assessment" is considered in a later section.<sup>22</sup>

### § 1236. Summary Modes of Collection.

For the collection of taxes, as well as for the appraisement of property for taxation, summary modes of procedure may be used, the justification for this being that, without such means, no government could exist. Hence it has been held that, when a tax is assessed and collected according to customary modes and usages, or in subordination to the principles underlying them, the requirements of due process are satisfied. "This must be so," the court said in *King v. Mullins*,<sup>23</sup> "else the existence of government might be put in peril by the delays attending upon formal judicial proceedings for the collection of taxes."

In *State Railroad Tax cases*,<sup>24</sup> the court said: "It is a wise policy. It is founded in the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and often modes of procedure are necessary, than those which belong to courts of justice."

In *Chatham v. United States*,<sup>25</sup> the court said: "If there existed in the courts, State or National, any general power of impeding or controlling

<sup>19</sup> 95 U. S. 37.

<sup>20</sup> 134 U. S. 232.

<sup>21</sup> 187 U. S. 51.

<sup>22</sup> See § 1240.

<sup>23</sup> 171 U. S. 404.

<sup>24</sup> 92 U. S. 575.

<sup>25</sup> 92 U. S. 89.

the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary."

In *Springer v. United States*,<sup>26</sup> the court said: "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involve any wrong or unnecessary harshness, it was for Congress, or the people who make Congresses, to see the evil was corrected. The remedy does not lie with the judicial branch of the government." <sup>27</sup>

It will be noted that in several of the foregoing cases the practical requirements of efficient government furnish the basis of argument. This same justification is even more emphasized in later cases, and, with the continuing increase in number and complexity of governmental functions, we may confidently expect that the courts will strengthen the hands of the administration whenever possible. It is not to be expected, however, that the judiciary will ever resign the right to determine whether the facts administratively determined are such as fall within the field of judgment granted to the administrative agents by the law, or whether, admitting the facts to be so determined, they furnish the authority for the executive acts predicated upon them.

### § 1237. Injunctions and State Taxes.

In some, but not all, of the States it is provided by statute, as is the case with the Federal Government, that injunctions shall not issue restraining the collection of taxes. In cases coming to them from those States in which the use of injunctions for this purpose is permitted, the Federal courts have held, in accordance with the general principles of equity, that they will not enjoin the collection of State taxes when a plain and adequate remedy at law has been given to recover back taxes illegally collected, and the attack upon the assessment is based solely on the ground that it is illegal and void. In *Singer Sewing Machine Co. v. Benedict*<sup>28</sup> the cases upon this point were reviewed. In that case the court said: "It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity." When, however, it is further claimed that the manner

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<sup>26</sup> 102 U. S. 586.

<sup>27</sup> For other cases dealing with the necessity and constitutional propriety of summary proceedings for the levying and collection of taxes, see *Leigh v. Green* (193 U. S. 79); *Bullard v. Hunter* (204 U. S. 241); *Kentucky Union Co. v. Kentucky* (219 U. S. 140).

<sup>28</sup> 229 U. S. 481.

of the assessment amounts to a denial of constitutional rights, or that there have been such gross mistakes as to amount to fraud, the Federal courts have intervened. Thus, in *Johnson v. Wells, Fargo and Co.*<sup>29</sup> the Supreme Court upheld an injunction granted by the lower Federal court to restrain the collection of a tax based upon an assessment making the gross earnings within the State determine the value for assessment of express companies, notwithstanding the fact that by the Constitution of the State it was specifically provided that all taxes levied and assessed upon corporate property should be as nearly as possible in the same manner as those followed in the assessment of taxes on individual property, and where individuals and corporations other than railroad, telephone, telegraph, express, and sleeping-car companies were taxed according to the value of their property within the State without regard to their income.<sup>30</sup>

### § 1238. Special Assessments.

The taking by the State of private property in the form of taxes is held to be justified and not a taking of property for a public use without compensation, upon the theory that compensation is returned in the form of police protection and of other benefits flowing from the existence of the government. A logical extension of this justification permits the State to levy special taxes upon land embraced within a given district where the proceeds of such taxes are to be spent for improvements which, though of general public utility, are yet for the special and peculiar benefit of that district. For, as the court said in *Lockwood v. St. Louis*,<sup>31</sup> "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few. . . . General taxation for a mere local purpose is unjust; it burdens those who are not benefited and benefits those who are exempt from the burden."

In similarity to this principle that the property peculiarly benefited by a public improvement may be called upon, by a special assessment, to bear the cost thereof, is the principle that, in assessing the damages, when private property is taken for a public purpose under an exercise of the right of eminent domain, the resulting benefits to the owner from the public use to which his appropriated property is devoted may be subtracted from the value of the property taken. This right thus to set off benefits was denied by the Court of Appeals of the District of Columbia in several cases, but the Supreme Court of the United States, in *Bauman v. Ross*<sup>32</sup> emphatically repudiated the doctrine, saying: "The just compensation required by the Constitution to be made to the owner is to be measured by the loss

<sup>29</sup> 239 U. S. 234.

<sup>30</sup> The case was distinguished from *Adams Exp. Co. v. Ohio State Auditor* (165 U. S. 194) and *U. S. Exp. Co. v. Minn.* (223 U. S. 335).

<sup>31</sup> 24 Mo. 20.

<sup>32</sup> 167 U. S. 548.

caused to him by the appropriation [of his property]. He is entitled to receive the value of what he has been deprived of and no more. To award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered."

### § 1239. Taxes and Special Assessments Distinguished.

Special assessments are, properly speaking, taxes, and yet they are of so peculiar a character that the courts have not infrequently refused to bring them within the meaning of the term "tax." Thus where certain corporations or pieces of property have been by law exempted from taxation, they have, nevertheless, been held subject to special assessments.<sup>33</sup> Again, where State Constitutions have provided that taxation shall be equal and uniform, or that all property shall be taxed according to its value, the courts have nevertheless held that special assessments for local improvements may be levied and assessed according to the front-foot rule or by a standard other than that of value.

Judge Cooley quotes the following from the decision of a Mississippi court in illustration of the distinction between a tax and a special assessment:

"A local assessment can only be levied on land, it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied upon the whole State or a known political subdivision as a county or town. A local assessment is levied upon property situated in a district created for the express purpose of the levy and possessing no other function or even existence than to be the thing upon which the levy is made. A tax is a continuing burden and must be collected at short intervals for all time and without it government cannot exist; a local assessment is exceptional both as to time and locality, it is brought into being for a particular occasion and to accomplish a particular purpose and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is *like* a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is *like* a tax in that it must be levied for a public purpose and must be apportioned by some reasonable rule among those upon whose

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<sup>33</sup> *Lefevre v. Detroit* (2 Mich. 586); *Ill. Cent. R. Co. v. Decatur* (126 Ill. 92). See *Mich. Law Review*, II, 455.

property it is levied. It is *unlike* a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."<sup>34</sup>

#### § 1240. Constitutional Requirements of Special Assessments.

The power of the legislature to establish special taxing districts upon the lands within which a special tax is to be levied, assessed, and collected is limited by the following rules: (1) There must be some reasonable ground for grouping into a single district the lands composing it, and this reasonable ground must, as has been seen, be that the lands in question will derive special benefit from the public improvement to meet the expenses of which the tax is levied. It is, however, to be observed that the legislature has a very broad discretion as to the limits of the areas selected for special assessment purposes. (2) The tax so levied must be assessed according to a rule uniformly applied throughout the district, which, in its actual operation, will fairly distribute the tax among the several pieces of property affected according to the benefits received or to be received from the public improvement which is undertaken. Whether or not the assessments may be in excess of the benefits is a question to be presently considered, but in any case they must be apportioned generally according to the benefits. By this is not meant that this apportionment must be absolutely exact. This, in most cases, is an impossibility. But, generally speaking, the part of the entire tax borne by each piece of land must agree with the part of the entire benefit received.<sup>35</sup>

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<sup>34</sup> George, C. J., in *Macon v. Patty* (57 Miss. 378). As to the doctrine that a non-resident cannot be made personally liable for a special assessment upon land owned by him in the State, see *Dewey v. Des Moines* (173 U. S. 204).

<sup>35</sup> In *Union Refrigerator Transit Co. v. Kentucky* (199 U. S. 194) the court said: "But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly v. Pittsburgh* (104 U. S. 78); *Amesbury Nail Factory Co. v. Weed* (17 Mass. 53); *Thomas v. Gay* (169 U. S. 264); *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* (197 U. S. 430). Subject to these individual exceptions the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood v. Baker* (172 U. S. 269)."

**§ 1241. Resort to Special Assessments Discretionary with the Legislature.**

When a public improvement is to be undertaken which will result in special benefit to a particular district, it is not obligatory upon the legislature to levy a special assessment upon that district for the purpose. Whether or not it will do so lies within its free discretion. Also the fact that the proposed improvement will be, to a certain extent, of general benefit to the whole community, does not render invalid a special assessment upon the district specially benefited.

In *Bauman v. Ross*,<sup>36</sup> with reference to an act of Congress relating to the District of Columbia, it was contended by some of the owners of lands that the public improvement proposed was not of a local character, but was for the advantage of the whole country, and should be paid for by the United States, and not by the District of Columbia, or by the owners of the lands affected by the improvement. The court, however, said: "It is for the legislature, and not the judiciary, to determine whether the expense of a public improvement should be borne by the whole State, or by the district or neighborhood immediately benefited. The case, in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile harbor; and, speaking by Mr. Justice Field, said: 'The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless constrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.'" <sup>37</sup>

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<sup>36</sup> 167 U. S. 548.

<sup>37</sup> Citing *Mobile County v. Kimball* (102 U. S. 691). The opinion continued:

"The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of the land benefited thereby. *Davidson v. New Orleans* (96 U. S. 97); *Hagar v. Reclamation Dist. No. 108* (111 U. S. 701); *Spencer v. Merchant* (125 U. S. 345); *Walston v. Nevin* (128 U. S. 578); *Lent v. Tillson* (140 U. S. 316); *Illinois C. R. Co. v. Decatur* (147 U. S. 190); *Paulsen v. Portland* (149 U. S. 30). This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. *Willard v. Presbury* (14 Wall. 676); *Mattingly v. District of Columbia* (97 U. S. 687); *Shoemaker v. United States* (147 U. S. 282).

"The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to con-

### § 1242. Special Assessments in Excess of Benefits.

It has been seen that the justification for a special assessment is the special benefits received. Logically and justly, it would seem, therefore, that such special assessments should in no case be permitted to exceed, to any substantial extent at least, the benefits which justify them. In fact, however, the rule for a considerable number of years appeared to be that, so long as assessments are apportioned according to benefits, they are not necessarily measured in absolute amount by such benefits. Thus, for example, in *Bauman v. Ross*,<sup>38</sup> cited above, in which was involved a law which provided that one-half of the amount measured as damages for the taking of the lands needed for the improvement contemplated should be assessed upon the lands benefited, no proviso appeared to meet cases in which the assessments thus provided for might exceed the benefits conferred; yet the court declared: "This fixing of the gross sum to be assessed was within the authority of Congress."

### § 1243. Doctrine of *Norwood v. Baker*.

In 1898, however, was decided the case of *Norwood v. Baker*,<sup>39</sup> which seemed to state a new doctrine. The facts in this case were these: By an ordinance of the village of Norwood a street was cut through the land of a Mrs. Baker, and a special assessment levied upon her equalling in amount not simply the value of the land taken, but, in addition thereto, the costs and expenses connected with the condemnation proceedings. Only the

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sist of such lands, and such only, as the commissioners shall decide to be benefited. *Spencer v. Merchant*, and *Shoemaker v. United States*, above cited; *Fallbrook Irrig. Dist. v. Bradley* (164 U. S. 112); *Ulman v. Baltimore* (165 U. S. 719). See also the very able opinion of the court of appeals of New York, delivered by Judge Ruggles, in *People v. Brooklyn* (4 N. Y. 419).

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners. *Mattingly v. District of Columbia*; *Spencer v. Merchant*; *Watson v. Nevin*; *Shoemaker v. United States*; *Paulsen v. Portland*, and *Fallbrook Irrig. Dist. v. Bradley*, above cited.

"If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. *Davidson v. New Orleans*; *Spencer v. Merchant*; *Watson v. Nevin*; *Lent v. Tillson*; *Paulsen v. Portland*, and *Fallbrook Irrig. Dist. v. Bradley*, above cited.

"The whole sum directed by § 15 to be assessed upon lands benefited is one-half of 'the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act.' This fixing of the gross sum to be assessed was clearly within the authority of Congress, according to the above cases."

<sup>38</sup> 167 U. S. 548.

<sup>39</sup> 172 U. S. 269.



lands of Mrs. Baker were affected by the ordinance. The validity of this assessment was contested, not on the ground that it would in fact impose a tax in excess of the benefit received, but that the amount of the assessment to be paid, namely, a sum equal to the amount paid for the land taken for the street, together with the cost of the condemnation proceedings, was fixed without any relation to the benefits to be received. It would seem that to this contention it might have been replied that inasmuch as but one piece of land was concerned it was not possible to lay down a *rule* of apportionment. The court, however, went beyond this and held, apparently, that in all cases a special assessment is *prima facie* invalid which casts upon abutting property the cost of an improvement, without reference to the benefits received. After admitting that the principle was well established, that abutting owners might be subjected to special assessments to meet the expense of opening public highways in front of their property, the majority of the court in their opinion said: "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon a particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property-owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable; and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of

equity, when its aid is invoked to restrain the enforcement of a special assessment."

The reasoning of the court, as shown in the quoted paragraphs, is not perfectly clear, but the argument would seem to be that inasmuch as the assessments may never constitutionally exceed the amount of the benefits, therefore the assessment in question was illegal because no opportunity was provided for showing that in fact the benefits were exceeded, or that if this were shown, no provision was made for the reduction of the assessment.<sup>40</sup>

<sup>40</sup> In a dissenting opinion concurred in by three justices, after citing authorities as to the discretionary power vested in a legislature to establish special taxing districts, it was said:

"The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost. It is unnecessary to inquire how far courts might be justified in interfering in a case in which it appeared that the legislature had attempted to cast the burden of a public improvement on property remote therefrom, and obviously in no way benefited thereby; for here the property charged with the burden of the improvement is that abutting upon such improvement,—the property *prima facie* benefited thereby,—and the authorities which I have cited declare that it is within the legislative power to determine the area of the property benefited, and the extent to which it is benefited. It seems to me strange to suggest that an act of the legislature, or an ordinance of a city, casting, for instance, the cost of a sewer or sidewalk in a street upon all the abutting property, is invalid, unless it provides for a judicial inquiry whether such abutting property is in fact benefited, and to the full cost of the improvement, or whether other property might not also be to some degree benefited, and therefore chargeable with part of the cost. . . .

" . . . Here the plaintiff does not allege that her property was not benefited by the improvement, and to the amount of the full cost thereof; does not allege any payment or offer to pay the amount properly to be charged upon it for the benefits received, or even express a willingness to pay what the courts shall determine ought to be paid. On the contrary, so far as the record discloses, either by the bill or her testimony, her property may have been enhanced in value ten times the cost of the condemnation.

"The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvement, and belonging to plaintiff, is in the slightest degree benefited thereby. Nor is there an averment or a suggestion that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that a legislative act charging the cost of an improvement in laying out a street (and the same rule obtains if it was the grading, macadamizing, or paving the street) upon the property abutting thereon is adjudged, not only not conclusive that such abutting property is benefited to the full cost thereof, but, further, that it is not even *prima facie* evidence thereof, and that, before such an assessment can be sustained, it must be shown, not simply that the legislative body has fixed the area of the taxing district, but, also, that by suitable judicial inquiry it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void, because the rule of assessment is erroneous, implies that it is *prima facie* erroneous to cast upon property abutting upon an im-

**§ 1244. Norwood v. Baker Explained and Limited by Later Cases.**

The decision in the case of *Norwood v. Baker* was for a time extraordinarily disconcerting. For if, as the language of the opinion in this case seemed to hold, a special assessment according to some uniform rule of assessment, such as the front-foot rule, could not be applied until it had been determined, after a hearing, that it would not impose upon any particular piece of property a tax in substantial excess of the benefit conferred by the improvement upon that property, the practice and procedure of special assessments throughout the country would in many cases have to be revised.

In a series of cases, decided in 1901, however, the court brought back the law very nearly, if not quite, to its former condition. The chief opinion was rendered in *French v. Barber Asphalt Paving Co.*<sup>41</sup> In this case it was held that the apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any judicial inquiry as to their value or the benefits they received, might be authorized by the legislature. In its opinion the court reviewed at length the scope and effect given in previous cases to the phrase "due process of law" in its application to the taxing power, and, coming to the case of *Norwood v. Baker*, said, in effect, that that case was a peculiar one, relating to a single piece of property, and that the decree of the court was not based upon a general principle of law that an assessment cannot be levied without provision for a preliminary hearing as to the benefits, but simply, that the particular assessment then before the court was not a proper one. "Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question."<sup>42</sup>

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provement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement is *prima facie* void; that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity canceling *in toto* the assessment, without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement.

"In this case no tender was made of any sum, no offer to pay the amount properly chargeable for benefits, there was no allegation or testimony that the legislative judgment as to the area benefited, or the amount of the benefit, was incorrect, or that other property was also benefited; and the opinion goes to the extent of holding that the legislative determination is not only not conclusive, but also is not even *prima facie* sufficient, and that in all cases there must be a judicial inquiry as to the area in fact benefited. We have often held the contrary, and, I think, should adhere to those oft-repeated rulings."

<sup>41</sup> 181 U. S. 324.

<sup>42</sup> In a dissenting opinion, rendered by Justice Harlan, and concurred in by Justices White and McKenna, it was argued, and with force, that the doctrine declared in the case at bar did in fact modify that declared in *Norwood v. Baker*. The argument was, however, too long to be quoted.

In *Tonawanda v. Lyon* <sup>43</sup> practically the same facts as those in *French v. Barber Asphalt Paving Co.* were involved. In the majority opinion, with reference to the *Norwood v. Baker* case, it was said: "It was not the intention of the court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment. . . . The case of *Norwood v. Baker* presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships' amounting in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment."

In *Wight v. Davidson*,<sup>44</sup> decided at the same time as *Tonawanda v. Lyon* and *French v. Barber Asphalt Paving Co.*, the objection was raised to an act of Congress relating to the District of Columbia, that it arbitrarily fixed the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed by the opening of a street. The lower court, in its opinion, had said with reference to *Norwood v. Baker*, "As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of special benefit which was accrued to him for the public improvement adjacent to his property." As to this construction thus placed upon its position the Supreme Court said:

"We think the court of appeals in regarding the decision in *Norwood v. Baker* as overruling our previous decisions . . . misconceived the meaning and effect of that decision. There the question was as to the validity of a village ordinance which imposed the entire cost and expenses of opening a street, irrespective of the question whether the property was benefited by the opening of the street. The legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits. There having been no legislative determination as to what lands were benefited, no inquiry instituted by the village councils, and no opportunity afforded to abutting owners to be heard on the subject, this court held the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, *to the extent of such excess*,<sup>45</sup> a taking under guise of taxation of private property for public use, without compensation."<sup>46</sup>

<sup>43</sup> 181 U. S. 389.

<sup>44</sup> 181 U. S. 371.

<sup>45</sup> Italics are by the court.

<sup>46</sup> In an earlier chapter it has been shown that the requirement of the Fifth Amendment that no person shall be deprived of property without due process of law lays the same obligation upon the Federal Government as that imposed by the same words of

As declared by Justice Harlan in his dissenting opinion, in *French v. Barber Asphalt Paving Co.*, it is uncertain whether or not the court intended definitely to repudiate the doctrine that a special assessment upon a piece of property in substantial excess of the benefits conferred upon that property by the improvement, is a taking of property without due process of law. This uncertainty became still more evident by the decisions of the court in *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*,<sup>47</sup> decided in 1905, and *Martin v. District of Columbia*,<sup>48</sup> decided in 1907.

The first case was a proceeding under a Kentucky statute to enforce a lien upon a lot for grading, curbing and paving a carriage highway. The plaintiff in error pleaded that its only interest in the lot was for a right of way for a railroad, and that neither this right of way nor the lot would or could get any benefit from the improvement, but that, on the contrary, the property would be injured by the increase of travel close to the plaintiff's tracks. To the argument that this assessment was, therefore, in violation of the Fourteenth Amendment, the Supreme Court, however, answered that the reasoning assumed an exactness in the premises which did not exist. The amount of benefit which a piece of property will derive from

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the Fourteenth Amendment upon the States. It is rather surprising, therefore, to find the Supreme Court in *Wight v. Davidson* (181 U. S. 371) in its efforts to distinguish that case from *Norwood v. Baker* (172 U. S. 269) saying: "In the present case is involved the constitutionality of an act of Congress regulating assessments on property in the District of Columbia in respect to which the jurisdiction of Congress in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment of the Constitution of the United States, which provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation." In a dissenting opinion filed by Justice Harlan and concurred in by Justices White and McKenna, it was said with reference to the observations above quoted from the majority opinion: "I refer to this part of its (the Court's) opinion only for the purpose of recording my dissent from the intimation that what a State might not do in respect of the deprivation of property without due process of law, Congress under the Constitution could, perhaps, do in respect of property in this District. . . . It is inconceivable to me that the question whether a person has been deprived of property without due process of law can be determined upon principles applicable to the Fourteenth Amendment, but not applicable to the Fifth Amendment, or upon principles applicable under the Fifth Amendment, and not applicable under the Fourteenth Amendment. It seems to me that the words 'due process of law' mean the same in both Amendments. The intimation to the contrary in the opinion of the court is, I take leave to say, without any foundation upon which to rest, and is most mischievous in its tendency."

<sup>47</sup> 167 U. S. 430.

<sup>48</sup> 205 U. S. 135.

a public improvement is, it was declared, a matter of forecast and estimate, not of direct and exact statement. "In its general aspects, at least, it is peculiarly a thing to be decided by those who make the laws." The court then went on to state the doctrine, which it declared to have been implied in the earlier cases, that so long as an act is in general fair and just, it is not rendered invalid by the fact that, as to particular areas, the benefits are less than the assessments. "If a particular case of hardship arises under it in its natural and ordinary application that hardship must be borne as one of the imperfections of human things."

In *Martin v. District of Columbia* <sup>49</sup> was involved a law of Congress relating to the District of Columbia providing for the opening of alleys and the assessment of damages upon the lots in the square concerned. Contest was made by certain lot owners that their properties would not be benefited, at least to the extent of the assessments, by the opening of alleys. The court, after referring to the terms of the law, said:

"The law is not a legislative adjudication concerning a particular place and a particular plan, like the one before the court in *Wight v. Davidson*, 181 U.S. 371. It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the act would not be disposed of by the decision in *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430. That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical and mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the 14th Amendment, a system of delusive exactness and merely logical form.

"But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation

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<sup>49</sup> 205 U. S. 135.

and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in *French v. Barber Asphalt Paving Co.* (181 U. S. 324), to reconcile the decision in that case with *Norwood v. Baker* (172 U. S. 269)."

But it is evident that the court itself felt that a position was being taken which could not be clearly harmonized with earlier cases, for the opinion continued:

"And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in *Wight v. Davidson*, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation of *Bauman v. Ross* (167 U. S. 548), when the same principle was sustained in a general law. It is true again that in *Bauman v. Ross* the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that, on the practical distinction to which we have adverted in connection with *Louisville & N. R. Co. v. Barber Asphalt Paving Co.* the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground.

"In view of the decisions to which we have referred it would be unfortunate if the present act should be declared unconstitutional after it has stood so long. We think that without a violent construction of the statute it may be read in such a way as not to raise the difficult question with which we have been concerned. It is true that the jury is to apportion an amount equal to the amount of the damage ascertained, but it is to apportion it 'according as each lot or part of lot of land in such square may be benefited by the opening, etc.' Very likely it was thought in general, having regard to the shortness of the alleys, the benefits would be greater than the cost. But the words quoted permit, if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if it is so limited all serious doubt as to the validity of the statute disappears."

In *Kansas City Southern R. Co. v. Road Improvement District* <sup>50</sup> it was declared that to justify a special assessment upon particular lands it is not essential that the benefits shall be direct or immediate, but that it is essential that the accruing of the benefit shall not be a mere matter of speculation. Thus, in this case it was held (to quote the syllabus) that "a State statute which sanctions assessing a railway company for benefits from a highway improvement upon a theory which, disregarding area and distance

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<sup>50</sup> 256 U. S. 658.

from the highway, assumes that 9.7 miles of railway in a purely farming section, treated as an aliquot part of the railway system, will receive benefits amounting to \$67,900 from the construction of 11.2 miles of gravel road, while farm lands and town lots are assessed according to area and position, and wholly without regard to their value, the improvements thereon, or their present or prospective use, is invalid as producing a discrimination against the railway so palpable and arbitrary as to amount to a denial of the equal protection of the laws."

In *Briscoe v. Rudolph* <sup>51</sup> the court said: "The question of the excessiveness of a special assessment for benefits resulting from a public street improvement is one of fact." <sup>52</sup>

It is established that special assessments may be levied upon property for benefits that have previously accrued to it by reason of public improvements. <sup>53</sup>

#### § 1245. Summary.

Summarizing the result, or rather the tendency, of the cases reviewed, it would appear that the Supreme Court has drawn away from the doctrine stated in its earlier cases that a special assessment will be upheld if apportioned according to a rule which, in its general operation, distributes the burden of the tax in proportion to the benefits received, even though such assessments may, as to particular pieces of property, be in substantial excess of the benefits received. In place of this doctrine the court, though with considerable falterings, has declared that "when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great" the assessment will not be sustained. Except in such extreme cases, however, the legislative determination as to the propriety of the assessment and of the mode of its apportionment will be held controlling.

#### § 1246. Notice in Special Assessments.

The doctrine would seem to be well established that notice is not required to be given to owners of property subjected to special assessment when the legislature itself fixes assessment, the districts upon which it is to be levied, and the mode of apportionment; but that it is otherwise when these determinations have been delegated by the legislature to some subordinate body. <sup>54</sup> In the cited case the court declared with reference to assessments levied by subordinate bodies: "Due process of law requires that, at some stage of the proceeding, before the tax becomes irrevocably fixed, the tax-

<sup>51</sup> 221 U. S. 547.

<sup>52</sup> Citing *English v. Arizona* (214 U. S. 359).

<sup>53</sup> See *Wagner v. Leser* (239 U. S. 207) and authorities therein cited.

<sup>54</sup> *Londoner v. Denver* (210 U. S. 373).



payer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing."

A comparatively recent case upon the foregoing points is that of *Browning v. Hooper*,<sup>55</sup> decided in 1926, and sometimes spoken of as the Archer County case.

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<sup>55</sup> 269 U. S. 396.

## CHAPTER CIII

### DUE PROCESS OF LAW AND JURISDICTION TO TAX

#### § 1247. Territorial Sovereignty.

With regard to the jurisdiction to tax a fundamental distinction exists between the powers of the United States and those of its constituent States. This distinction arises from the fact that the United States, in its dealings with other States, appears as an independent and sovereign body, whereas the individual States of the Union have a political status only as members of the Union and possess no powers of legal action outside their respective territorial limits. It thus results that, in many jurisdictional respects, including that of taxation, the United States can take action with regard to personal or property outside the territorial limits of the United States which the individual States of the Union may not take outside their respective limits.<sup>1</sup>

Of the complete jurisdiction of a sovereign State over all property within its territorial limits, whether for purposes of taxation, of eminent domain, or the regulation of its use in private hands, there is no dispute. Controversies as to jurisdiction, therefore, seldom if ever arise with regard to corporeal things. It is only with reference to incorporeal hereditaments or intangible personalty that questions as to *situs* for purpose of legal regulation or control occur.

Many of these questions are solved by applying the principle that *mobilia sequuntur personam*, but no State permits this general doctrine or fiction to defeat its jurisdiction if there are any substantial grounds for holding that the personalty or incorporeal hereditament has a *situs* within its borders independently of the place of residence or domicile of its owner. Thus, sovereign States have not hesitated, under certain circumstances, to exercise jurisdiction over intangible personalty, even when owned by non-resident aliens, when the evidences of ownership—the bonds, promissory writings, mortgage instruments, or other evidences of credits—are, in fact, situated within their respective limits. In other cases, as will presently be seen, States base their rights of legal control, especially for purposes of taxation, upon the fact that the credits taxed are in the form of

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<sup>1</sup> Generally as to the jurisdictional rights of sovereign States see the author's *Fundamental Concepts of Public Law* (The Macmillan Co., 1924.) Several of the paragraphs which follow are taken, in substance, from that work. See also Chapter XLII of the present work entitled "Limitations upon the Federal Taxing Power."

profits arising out of corporate or other business undertakings carried on within its borders, or that the mortgages or other liens are upon property similarly situated.

The States of the American Union as between themselves, are foreign governments and their jurisdictions are strictly territorial in character, and, therefore, as between themselves, the Supreme Court applies the principles of public law that govern the relations of sovereign States to one another.

Because of the non-sovereign status of the States, and the fact that they have no dealings, as independent political persons, with foreign States, they are wholly incapacitated from exercising jurisdiction over their own citizens who have obtained a foreign domicile. Thus, while it is a generally accepted principle of public law that a sovereign State may assert whatever jurisdiction it pleases over its own citizens wherever they may be, holding them responsible in its courts for breaches of its own laws both civilly and criminally, for acts committed by them while in foreign countries, the same is not true of the member States of the American Union. They can take no cognizance of acts committed outside their own territorial limits upon the ground that the accused or tort feors are their own citizens. And, of course, these States have no jurisdiction upon the high seas such as sovereign States possess. Furthermore, as a matter of express provision of the Federal Constitution, each of them is compelled to give full faith and credit to the public acts, records and judicial proceedings of the other States of the Union,—an obligation which, as between sovereign States, is voluntary in character and discretionary in extent.

In the case of *United States v. Bennett*,<sup>2</sup> decided in 1914, the Supreme Court, dwelling upon the principles to be applied in determining the jurisdictional powers of the individual States as distinct from those applicable in the case of the Union, pointed out that while the attempt of one of these States to tax property outside its territorial limits would be in violation of the provision of the Federal Constitution which prohibits it from taking property without due process of law, the same was not true of the United States itself. The court said: "The application to the States of the rule of due process relied upon [by counsel in the case] comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State [of the Union] to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution, and therefore embraces all the attri-

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<sup>2</sup> 232 U. S. 299.

butes which pertain to sovereignty in the fullest sense. . . . Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority, and thus destroying the rights of other States [of the Union], and at the same time saving their rights from destruction by the other States, in other words, of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional boundary around the exterior confines of the United States for the purpose of shutting that Government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The decision of the Supreme Court in the case known by the descriptive title "State Tax on Foreign-Held Bonds,"<sup>3</sup> decided in 1873, has been one of the most discussed of the decisions of that court, and the doctrine therein declared, if not repudiated by later decisions, has at least been held down to practically the precise point then decided, namely, that bonds are property in the hands of their holders, and that, when these holders are non-residents of the State in which the company issuing them is incorporated or doing business, they are beyond the jurisdiction of that State.

With regard to the general powers of taxation which a State possesses, Justice Field, rendering the opinion for a unanimous court, said: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business which last is, of course, also a kind of property. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."<sup>4</sup>

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<sup>3</sup> Cleveland, etc., R. R. Co. v. Pennsylvania (15 Wall. 300).

<sup>4</sup> As to the situs of the property involved in this case, the court said: "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

In other cases the Supreme Court of the United States has held that the right of a

In this Foreign-Held Bonds case the State law was held invalid because, as applied to the bonds, it was in violation of the provision of the Federal Constitution that no State of the Union shall pass a law impairing the obligation of contracts.<sup>5</sup> The obligation impaired was that between the corporations which were ordered to pay the tax and their non-resident bondholders.

In *Hayes v. Pacific Steamship Co.*,<sup>6</sup> it was held that a State might not tax as property a ship of a foreign registry which was only temporarily in a port of the State,—which was, as it were, *in transitu*. Substantially the same was held in *Morgan v. Parham*.<sup>7</sup> So, also, in *St. Louis v. Wiggins Ferry Co.*,<sup>8</sup> it was held that the State of Missouri could not tax ferry-boats belonging to an Illinois company which boats were laid up on the Illinois shore when not in use. The court said: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *Ogden v. Saunders*,<sup>9</sup> the Supreme Court held that a State of the Union could not give an extraterritorial effect to its insolvency laws.

In the immediately foregoing cases the Supreme Court of the United States held the State laws invalid simply as *ultra vires* from the standpoint of territorial jurisdiction, and without reference to any specific inhibition laid upon the States by the Federal Constitution. However, in the later cases of *Louisville, etc., Ferry Co. v. Kentucky*,<sup>10</sup> decided in 1903, and *Delaware, L. & W. R. R. Co. v. Pennsylvania*,<sup>11</sup> decided in 1905, the Federal Supreme Court declared that an attempt of a State to tax property which did not have its situs within the State was in violation of the express prohibition laid upon the States by the Federal Constitution that they should deprive no person of property without due process of law.<sup>12</sup>

Since the decisions in these cases, the Supreme Court has repeatedly af-

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foreign corporation or non-resident to do business within a State may be subjected to what is in the nature of a license or excise tax. It has also been held that where foreign-held evidences of ownership or of credits are placed in the hands of resident agents for the purpose of collecting the interests, rents, etc., and of reinvesting the proceeds, they are to be deemed to have their situs within the State and therefore taxable by the State.

<sup>5</sup> Article I, Section 10.

<sup>9</sup> 12 Wheaton, 214.

<sup>6</sup> 17 Howard, 596.

<sup>10</sup> 188 U. S. 385.

<sup>7</sup> 16 Wallace, 471.

<sup>11</sup> 198 U. S. 341.

<sup>8</sup> 11 Wallace, 423.

<sup>12</sup> Fourteenth Amendment. As to this shifting of ground by the Federal Supreme Court, see the article by Dr. F. J. Goodnow, "Congressional Regulation of State Taxation," in the *Pol. Sci. Quar.*, Vol. XXVIII (1913), p. 405.

firmed the doctrine that the attempt of a State to tax property or persons beyond their jurisdiction will be declared void as a denial of due process of law.

#### § 1248. Personal Liability of the Property Owners.

The right to tax property depending upon the actual or constructive presence within the jurisdiction of the property taxed, in the case of a tax thus operating *in rem* rather than *in personam* against the owner, it has been held that an owner not domiciled in the State, cannot be made personally liable for the tax.<sup>13</sup> Thus in *Dewey v. City of Des Moines*<sup>14</sup> was held void a State statute authorizing special assessments for local improvements and attempting to make non-resident lot owners personally liable for such assessments, the court saying: "The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a State from taking jurisdiction through its courts by virtue of a statute, over a non-resident not served with process within the State, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. . . . A judgment, without personal service against a non-resident, is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one as in the case of a more formal judgment."

In *Corry v. Baltimore*<sup>15</sup> a law of Maryland was upheld which provided that stock in domestic corporations held by non-residents might be taxed, the tax to be paid by the corporations, which corporations were to have a lien upon the stock and a right of personal action against the non-resident stockholders to recover from them the amounts so paid. This law had, however, been construed by the Maryland courts, and this construction was accepted by the United States Supreme Court, to be, in reality, not a tax upon the stock as property, but a reasonable regulation upon the right to acquire the stock of the corporations which the State had created.<sup>16</sup>

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<sup>13</sup> So far as a tax operates upon persons, domiciliation in the State is the test. The terms "residents" and "inhabitants" when used in tax laws are, therefore, generally to be construed as referring to persons domiciled in the State.

<sup>14</sup> 173 U. S. 193.

<sup>15</sup> 196 U. S. 466.

<sup>16</sup> After referring to earlier decisions relating to the taxation of stock of national banks, the court said: "In substance the contention is that the conceded principle has no application to taxation by a State of shares of stock in a corporation created by it, because, by the Constitution of the United States, the States are limited as to taxation

All incorporeal hereditaments, such, for example, as corporate franchises, may be taxed only in the State from whose law they are derived and where, consequently, they have their legal situs.<sup>17</sup>

### § 1249. Real and Tangible Personal Property: Situs of, for Taxation.

There has never been question that real property may be taxed only by the sovereign of the actual situs, and, regarding this situs, there is, of course, no possible question so far as lands and improvements thereupon are concerned. As regards, however, interests, legal and equitable, in lands, arising by reason of deeds of trust, mortgages, receiverships, succession, etc., questions as to situs for purposes of taxation can arise, and they will be discussed in later sections of the present chapter.

That tangible personal property of all kinds may be taxed by the State within which it is situated has never been questioned.<sup>18</sup>

That tangible personal property situated in one State may not be taxed by another State, even though its owner be domiciled therein, was definitely stated in *Union Refrigerator Transit Co. v. Kentucky*,<sup>19</sup> decided in 1905. In this case was presented the question whether a corporation organized under the laws of Kentucky might be assessed upon its rolling stock permanently located in other States and employed there in the prosecution

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to persons and things within their jurisdiction, and may not, therefore, impose upon a nonresident, by reason of his property within the State, a personal obligation to pay a tax. By the operation, therefore, of the Constitution of the United States, it is argued the States are restrained from affixing, as a condition to the ownership of stock in their domestic corporations by nonresidents, a personal liability for taxes upon such stock, since the right of the nonresident to own property in the respective States is protected by the Constitution of the United States, and may not be impaired by subjecting such ownership to a personal liability for taxation. But the contention takes for granted the very issue involved. The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the States of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a State, in creating a corporation, is not an exercise of the taxing power of the State over persons and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the State carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a State to affix to the holding of stock in a domestic corporation a liability on a nonresident as well as a resident stockholder *in personam*, in favor of the ordinary creditors of the corporation."

<sup>17</sup> Cf. Cooley, *Taxation*, 4th. ed., 448.

<sup>18</sup> See, for example, *Coe v. Errol* (116 U. S. 517); *Brown v. Houston* (114 U. S. 622); and other cases relating to the taxation by the State of articles of interstate commerce.

<sup>19</sup> 199 U. S. 194.

of its business. The court, in its opinion, said: "The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived."

Continuing, the court pointed out that the doctrine as to intangible personalty had no application. "The arguments in favor of the taxation of intangible property at the domicile of the owner," the court said, "have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a State other than that of its owner, is taxable there."<sup>20</sup>

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<sup>20</sup> After citing earlier cases decided by itself, the Supreme Court continued: "There are doubtless cases in the State reports announcing the principle that the ancient maxim *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicile of the owner; but upon examination they all, or nearly all, relate to intangible property, such as stocks, bonds, notes, and other choses in action. We are cited to none applying this principle to tangible personal property, and after a careful examination have not been able to find any wherein the question is fairly presented, unless it be that of *Wheaton v. Mickel* (67 N. J. L. 525, 42 Atl. 843) where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however, that they were permanently located there. The case turned upon the construction of a State statute and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles, and vessels engaged in navigation. But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt it as the domicile of its owner." Finally, the court said that the question had been, in fact, completely covered in the two cases of *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, and *Delaware, L. & W. R. Co. v. Pennsylvania* (198 U. S. 341).

The first of these two cases we have already considered. In the second it was held that including in the appraisal of the capital stock of a domestic corporation, for purposes of taxation, the value of coal mined by it within the State, but situated within other States there awaiting the sale was in excess of the State's taxing power. The supreme court of the State having held that the tax on the value of the capital stock was a tax on the property and assets of the corporation issuing the stock, and it having



**§ 1250. Vessels: Situs of, for Taxation.**

No general rule may be laid down for determining the situs of vessels for purposes of taxation. In the absence of countervailing practical reasons, their situs may be said to be the place where registered, but these countervailing reasons are so many that this rule is not of great value.

As to vessels plying between the ports of different States, and engaged in coastwise traffic, their situs is ordinarily held to be the domicile of the owner,<sup>21</sup> and irrespective of the place of enrollment. But even this rule is subject to the exception that where a vessel had acquired an actual situs in a State other than that of its owner, it may be taxed by that State.<sup>22</sup>

**§ 1250a. Taxation of Property Situated in Several Jurisdictions.**

The instrumentalities through which commerce is carried on between the States and with foreign countries may be taxed by the States as property to the extent that such instrumentalities are within the several territories of the States so taxing them. Thus buildings used for freight and passenger stations and for offices, roadbeds, rails, machine shops, etc., may be taxed by the States in which they are situated, so long as the tax is a general property tax and not one laid upon them specially, nor at a special rate because of their employment in interstate commerce. In determining, however, the value of these properties, the important principle has been laid down that in estimating the value of the property within the State, of a company doing business in several States, the entire property may be

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been repeatedly held by the Federal Supreme Court itself that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence that no tax can thus be levied which includes property that is otherwise exempt, the court held in the case at bar that the coal actually situated outside of Pennsylvania at the time of the assessment might not be included in the appraisalment for purposes of taxation of the capital stock of the plaintiff domestic corporation. "We regard," said the court, "this tax as, in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it."

The doctrine declared in *Union Refrigerator Transit Co. v. Kentucky* (199 U. S. 194) and the two prior cases upon which that case was rested,—*Louisville & Jeffersonville Ferry Co. v. Kentucky* (188 U. S. 385) and *D., L. & W. R. R. Co. v. Pennsylvania* (198 U. S. 341), is a comparatively recent doctrine. Until these cases were decided the doctrine was generally held and acted upon in many of the States that all personal property, tangible as well as intangible, wherever situated, might be taxed at the domicile of the owner. In *Coe v. Errol* (116 U. S. 517) decided in 1886, the court said, without qualification, "If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also."

<sup>21</sup> *Ayer & L. Tie Co. v. Kentucky* (202 U. S. 409).

<sup>22</sup> *Southern Pacific Co. v. Kentucky* (222 U. S. 63).

treated as a unit and its value in use as such determined, and the value of the part of the property in the particular State estimated as bearing the same proportion to the whole property as the amount of the business done in the State bears to the entire business done by the company, or the mileage of tracks of a railway company, or of wires, of a telegraph or telephone company, bears to the entire mileage of tracks or wires of the company taxed.

### § 1251. The Unit Rule.

As to railroad, telegraph and sleeping-car companies engaged in interstate commerce the rule is, as stated by the court in *Adams Express Co. v. Ohio State Auditor*,<sup>23</sup> "that their property in the several States through which their lines of business extend may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained may be taxed by the particular State, without violating any Federal restriction."<sup>24</sup> The valuation is, thus, not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping-car company, but includes the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (*Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 439); or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States (*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of its lines everywhere, deducting a sum equal to the value of the real estate and machinery subject to local taxation within the State (*Western U. Tel. Co. v. Taggart*, 163 U. S. 1).<sup>25</sup>

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<sup>23</sup> 165 U. S. 194.

<sup>24</sup> Citing *Western U. Tel. Co. v. Mass.* (125 U. S. 530); *Mass. v. Western U. Tel. Co.* (141 U. S. 40); *Maine v. Grand Trunk R. Co.* (142 U. S. 217); *Pittsburg, C., C. & St. L. R. Co. v. Backus* (154 U. S. 421); *Cleveland, C., C. & St. P. R. Co. v. Backus* (154 U. S. 439); *Western U. Tel. Co. v. Taggart* (163 U. S. 1); *Pullman Palace Car Co. v. Penn.* (141 U. S. 18).

<sup>25</sup> In the earlier part of this quotation the tense has been changed.

**§ 1252. Adams Express Co. v. Ohio.**

This "unit in use" principle of valuation received a radical application in the case of *Adams Express Co. v. Ohio State Auditor*,<sup>26</sup> decided in 1897, for there the actual tangible property within the State was inconsiderable, whereas the value of the entire concern measured by the amount of business done was very great. Furthermore, there was there lacking that physical unity of plant which is found in railroad and telegraph companies. The court, however, said:

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter: but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use.

"The cars of the Pullman company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract; and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the State authorities on the basis indicated.

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad, telegraph, and sleeping-car companies, to roadbed, rails, and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or in intangible property—in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

"We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business."

A strong dissenting opinion, concurred in by four justices, was rendered in this case. In a petition for a rehearing of the case,<sup>27</sup> Mr. James C. Carter, of counsel for the express company, declared: "The step now taken by the present decision is to evolve a new general proposition, not declared or distinctly discussed in any of the prior cases, that where there is what

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<sup>26</sup> 165 U. S. 194.

<sup>27</sup> *Adams Express Co. v. Ohio State Auditor* (166 U. S. 185).

is called a unity of use between several pieces of property not united together by any physical tie, some of the pieces situated within and some without the State, the value of the parts within may be determined by the value of the whole, even though the part within be physically separable, and is, as separated, an ordinary thing, having an ordinary market value based upon its capability of similar uses in a multitude of different businesses, differing in nothing, so far as the ascertainment of value is concerned, from the thousand other classes of chattels which form the usual subjects of taxation."

In the opinion refusing the rehearing prayed for, Justice Brewer said: "The Adams Express has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through the different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. . . . Where is the *situs* of this intangible property? Is it simply where its home office is, . . . or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and has its property, more or less, may rightfully say that the \$16,000,000 of value which it possesses springs not merely from the original grant and corporate property by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. . . . In conclusion let me say that this is eminently a practical age; that we must recognize things as they are and as possessing a nature which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations whose business is carried on through many States to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires." <sup>28</sup>

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<sup>28</sup> "As incident to this unit rule of valuation with mileage apportionment, the corporation has the right to show by all proper evidence that the application of the mileage rule of apportionment to such valuation is for any reason imperfect and unjust. Thus it may show that it holds property included in such valuation, as an entirety which is exempt from taxation. It may also show that its property in other States is of disproportionate value, as, for instance, that it is located in a more densely settled community, where it is disproportionately more productive, or consists of terminals in large cities or other States. All such facts are relevant as bearing upon the value of the

### § 1253. Taxation of Capital Stock of Companies Operating in Two or More States.

In taxing the property within the State of a company operating in two or more States the not unusual practice has been to levy the tax on the capital stock of the company, taking as the basis of assessment such proportion of its capital stock as the amount of its business within the State bears to the entire business done; and in railroads, telegraph and telephone companies, determining this proportion by the proportion of the total mileage of track or wires lying within the State. This, for example, was the method employed in the leading case of *Pullman's Palace Car Co. v. Pennsylvania*,<sup>29</sup> decided in 1891. This also was the method employed in *Delaware, L. & W. R. Co. v. Pennsylvania*,<sup>30</sup> in which it will be remembered it was held that in appraising the capital stock, tangible property located in other States might not be included.

### § 1254. Taxation of Movables.

In a series of cases the Supreme Court has held that in taxing the rolling stock of railway, sleeping-car and refrigerator companies, a State may estimate the number of cars upon the average kept and used within the State, and for the determination of this average may use any reasonable rule, the one ordinarily employed being that of mileage.<sup>31</sup> Conversely that part of the property of a corporation which upon an average is kept and employed outside of the State may not be taxed.<sup>32</sup>

### § 1255. Taxation of Intangible Personal Property.

Whereas, with reference to the taxation of tangible personal property, the practice has been to determine its situs by its actual location, with respect to intangible personalty, the principle of *mobilia sequuntur personam* has generally, though as we shall presently see, not always been applied.

In *Union Refrigerator Transit Co. v. Kentucky*<sup>33</sup> the court said: "There is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs* except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise en-

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State's portion of the entire property. A state statute or a procedure by a State under a statute which denied the company the opportunity of proving such facts, would doubtless be held invalid." Judson, *Taxation*, § 261.

<sup>29</sup> 141 U. S. 18.

<sup>30</sup> 198 U. S. 341.

<sup>31</sup> *Pullman's Palace Car Co. v. Pennsylvania* (141 U. S. 18).

<sup>32</sup> *Union Refrigerator Transit Co. v. Kentucky* (199 U. S. 194); *New York v. N. Y. C. & H. R. R. Co.* (202 U. S. 584).

<sup>33</sup> 199 U. S. 194.

forced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this court."

#### § 1256. Doctrine of State Tax on Foreign-Held Bonds Case.

However, in the case of State Tax on Foreign-Held Bonds,<sup>34</sup> decided in 1873, was laid down a rule and declarations made which, if strictly adhered to, would have greatly embarrassed the States in their attempts to tax intangible personal property, at least in the form of bonds, stock, etc., of domestic corporations, and of mortgages upon lands situated within their limits. In this case it was declared that bonds and other evidences of indebtedness of a domestic corporation are property in the hands of the holders, and, when held by non-residents of the State in which issued, are property beyond the jurisdiction of, and therefore not taxable by, that State despite the fact that these bonds are secured by mortgages on property situated within the State. The law contested in this case had required that a railroad company should, before the payment of the interest on certain of its bonds, retain out therefrom the amount of the tax and pay it over to the State. By this direction, it was held, the law operated to impair the obligation of the contract between the company and its non-resident bondholders. And the court held that it was such an impairment because it was not a proper exercise of the taxing power, the court saying: "The bonds issued by the Railway Company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties."

The reasoning by which the court reached the doctrine that the bond in the hands of non-resident bondholders was property without the jurisdiction of the State is given in the note below and, as will be seen, the language was broader than the case demanded.<sup>35</sup>

<sup>34</sup> 15 Wall. 300.

<sup>35</sup> "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands

The principles broadly laid down in the State Tax on Foreign-Held Bonds case <sup>36</sup> had soon to be further modified, and, in fact, the case has since been held down to the precise point decided. That public securities, consisting of State bonds and bonds of municipal corporations and circulating notes of banking institutions are exempted from the principle *mobilia sequuntur personam*, is stated in the case itself. But in later cases the same exemption is applied to shares of stock, mortgages, and, to a certain extent, to promissory notes and other credits. This will appear in the sections which follow.

### § 1257. Taxation of Shares of Stock.

Shares of stock in incorporated companies may be viewed either as property in the hands of their holders or as representing the property of the company. Thus they are viewed in the latter light when their value

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they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement. The property mortgaged belonged entirely to the Company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the Corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the Company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt.

"Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

"It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt, are not separated from the possession of the owners."

<sup>36</sup> 15 Wall. 500.

is taken as measuring the value of the property of the company for the purposes of a property tax upon that company. In such cases, as we have seen, tangible property of the company permanently located outside of the State may not be included in the appraisement. The States may also levy a license tax upon a domestic corporation, that is, upon its right not simply to be, but to do business within the State, and this license tax it may measure by the value of the capital stock. Also a State may levy a similar tax upon a foreign corporation, unless engaged in interstate commerce, the payment of which is made a condition precedent to its right to enter the State and to do business therein, and measure this tax by the nominal or market value of the capital stock of the company. In both of these cases the tax is not, in reality, upon the capital stock, but is measured by it.<sup>37</sup>

The declaration of the court in the *State Tax on Foreign-Held Bonds* case would, if strictly pursued, have prevented, upon the principle of *mobilia sequuntur personam*, the levying of such a tax upon non-resident holders of the stock corporations. In *Tappan v. Merchants' National Bank*,<sup>38</sup> however, the court held that, as to shares of stock at least, this principle does not reasonably apply, and that, for purposes of taxation, these shares may be separated from the person of their owner and given a situs where the corporation has its situs, namely, at the place of its incorporation. The court in that case said: "The question is then presented whether the General Assembly, having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purposes of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on. And this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose of carrying on mercantile, banking, brokerage or stock business. The property may be tangible or intangible, goods on the shelf or debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located.

"A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property

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<sup>37</sup> But see especially *W. U. Tel. Co. v. Kansas* (216 U. S. 1), and *The Pullman Co. v. Kansas* (216 U. S. 56).

<sup>38</sup> 19 Wall. 490.



in this stock is protected at the place where the bank transacts the business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purposes of taxation.”<sup>39</sup>

The doctrine declared in *Tappan v. National Bank*, though difficult to harmonize with prior decisions, was declared in *Corry v. Baltimore*<sup>40</sup> to be conclusively established.<sup>41</sup>

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<sup>39</sup> In criticism of this argument, Professor J. H. Beale, Jr., in the *Harvard Law Review* (XVII, 254) says: “But it is submitted that the supposed distinction between bonds and stocks in this respect does not exist. It is true, as has been seen, that the owner is taxable upon the capital and proceeds of a business where that business is carried on, and that a partner in a firm is therefore taxable on the value of a firm business where the firm acts; and that in many ways the shareholder in a private corporation is like a partner. But the very difference in their legal position should lead to a difference in taxation. The partner is taxed on the business of the firm because he is the legal representative of the business; there is no one else to tax. The tax paid by the partners is the tax and the only tax on the firm. But the corporation, being a legal entity, is itself, as has been seen, taxed upon the business done; to tax the stockholders also upon it is to tax the very same thing twice. The legal interest of the partner in the business is that of the owner; the legal interest of the stockholder is not that of the owner but of the creditor; to him is due from the corporation a share of the net profits. His claim is a personal one against the corporation; like the bondholder he has only a chose in action, and no direct legal interest in the business.”

<sup>40</sup> 196 U. S. 466.

<sup>41</sup> “That it was rightly determined that it was within the power of the State to fix, for the purposes of taxation, the *situs* of stock in a domestic corporation, whether held by residents or non-residents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. The whole contention is that, albeit the *situs* of the stock was in the State of Maryland for the purposes of taxation, it was nevertheless beyond the power of the State to personally tax the non-resident owner for and on account of the ownership of the stock, and to compel the corporation to pay, and confer upon it the right to proceed by a personal action against the stockholder in case the corporation did pay. Reiterated in various forms of expression, the argument is this: that as the *situs* of the stock within the State was the sole source of the jurisdiction of the State to tax, the taxation must be confined to an assessment *in rem* against the stock, with a remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay, or to give it when it did pay, a personal action against the owner.

“But these contentions are also in effect long since foreclosed by decisions of this court.” *First National Bank v. Kentucky* (9 Wall. 353); *Tappan v. Merchants' National Bank* (19 Wall. 490).

In *Hawley v. Malden* <sup>42</sup> the court again declared that there was no constitutional objection to the taxation of a resident of the State of shares of stock owned by him in foreign corporations which do no business and have no property within the taxing State. "It is well settled," said the court, "that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock and may be separately taxed." To the contention that this amounted to the taxation of property beyond the jurisdiction of the State, the court pointed out that those decisions which had declared that this could not be done had not involved the taxation of intangible personal property, nor of tangible personal property which, although physically outside the State of the owner's domicile, had not acquired an actual situs outside the State.<sup>43</sup> In *Louisville & J. Ferry Co. v. Kentucky* <sup>44</sup> it was pointed out that the taxation of a franchise granted by the taxing State was involved, which franchise was held to be an incorporeal hereditament with its legal situs in the State. "Shares," said the court, "fall within a different category. While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or choses in action. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys." "Undoubtedly," the court added, "the State in which a corporation is organized may provide, in creating it, for the taxation in that State of all its shares, whether owned by residents or non-residents."<sup>45</sup> This is by virtue of the authority of the creating State to determine the basis of organization and the liabilities of shareholders."<sup>46</sup>

### § 1258. Taxation of Mortgages.

In *Savings and Loan Society v. Multnomah County* <sup>47</sup> the broad *dicta* of the court in the State Tax on Foreign-Held Bonds cases were again modified, this time with reference to the taxation of mortgages. In this case the court held that mortgages, whether held by residents or non-residents, may be taxed at their full value by the State in which the mortgaged property is located, and that this may be done either by taxing the whole value of the property to the mortgagor or by taxing to the mortgagee the interest

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<sup>42</sup> 232 U. S. 1.

<sup>43</sup> *Southern P. Co. v. Kentucky* (222 U. S. 635).

<sup>44</sup> 188 U. S. 383.

<sup>45</sup> *Corry v. Baltimore* (196 U. S. 466).

<sup>46</sup> *Corry v. Baltimore* (196 U. S. 466); *Hannis Distilling Co. v. Baltimore* (216 U. S. 285).

<sup>47</sup> 169 U. S. 421.

represented by the mortgage and the remainder to the mortgagor. The court said: "The declaration of the court in the State Tax on Foreign-Held Bonds (15 Wall. 300) that a mortgage, being a mere security for the debt, confers no interest in the land, and, where held by a non-resident, is as much beyond the jurisdiction of the State as the person of its owner, 'went beyond what was required for the decision of the case and cannot be reconciled with other decisions of this court.'" Concluding, the court said: " . . . The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated, without contravening any provision of the Constitution of the United States."

### § 1259. Taxation of Credits.

In the preceding paragraphs we have seen that mortgages and shares of stock have been taken out of the broad doctrine declared in the State Tax on Foreign-Held Bonds cases, which placed them under the rule of *mobilia sequuntur personam*. To a very considerable extent the same is true as to promissory notes and similar evidences of indebtedness. The rule of *mobilia sequuntur personam* has not been followed when the notes have been placed in the hands of an agent for receipt of the interest or for the collection of the capital sums. In such cases the situs of the notes has in some cases been held to be that of the agent; in others, where there has been apparent a scheme to avoid the payment of taxes, the situs has been held to be at the domicile of their owner. A statement of some of the leading cases will illustrate these doctrines.

In *Kirtland v. Hotchkiss*<sup>48</sup> it is held that a State may tax one of its resident citizens for a debt held by him, due by a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides. In short, it is held that a debt for purposes of taxation is situated at the domicile of the creditor although secured by a mortgage upon real estate situated in another State. The court said: "The debt in question, although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor. It

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<sup>48</sup> 100 U. S. 491.

is none the less property, because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is, at best, only evidence of the debt itself. The bond may be destroyed, but the debt—the right to demand the repayment of money loaned, with the stipulated interest—remains. Nor is the locality of the debt, for purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt. The debt in question, then, having its *situs* at the creditor's residence, and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the State."

In *New Orleans v. Stempel* <sup>49</sup> it was held that moneys collected as interest and principal of notes, mortgages and other securities kept within the State for use or reinvestment, are subject to taxation though the owner be domiciled in another State and the moneys are deposited in a bank to his credit. The notes were declared to be "property arising from business done in the State; they were tangible property when received by the agent of the plaintiff, and as such, subject to taxation, and their taxability was not . . . lost by their mere deposit in the bank."

After quoting from decisions in other of the State courts, the Supreme Court continued: "With reference to the decisions of this court it may be said that there has never been any denial of the power of a State to tax securities situated as these are, while there have been frequent recognitions of its power to separate for purposes of taxation the *situs* of personal property from the domicile of the owner." Of the *dictum* of the court in *State Tax on Foreign-Held Bonds* <sup>50</sup> that "personal property, consisting of bonds, mortgages and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments. . . . constituting the evidences of debt are not separated from the possession of the owners," the court said: "This last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an independent *situs* for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of the law so often referred to, declares their *situs* to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when, in fact, they are in his possession."

After citing various cases, including *Tappan v. Merchants' National Bank*, <sup>51</sup> *Savings and Loan Society v. Multnomah Co.* <sup>52</sup> and *Kirtland v. Hotchkiss* <sup>53</sup> the opinion concluded: "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation wherever found, irrespective of the domicile of the owner; are

<sup>49</sup> 175 U. S. 309.

<sup>50</sup> 15 Wall. 300.

<sup>51</sup> 19 Wall. 490.

<sup>52</sup> 169 U. S. 421.

<sup>53</sup> 100 U. S. 491.

subject to levy and sale on execution, and to seizure and delivery under replevin, and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation.”

In *Bristol v. Washington Co.*,<sup>54</sup> it was held that investments by a non-resident of a State are subject to taxation under the laws of the State, when made by a resident agent who is employed to invest the moneys received, the loans being made payable at his office, he retaining the mortgages securing them, and the notes taken for the loans being returned to him whenever required for renewal, collection, or foreclosure of securities. The fact that the agent was given no authority to execute satisfactions of mortgages was held not controlling. Here it is plain that the notes as property were separated from the person of the owner and given a *situs* where they were in fact held and the business relating to them carried on. The court, in its opinion, quoting with approval the opinion of the State court, said: “A credit which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business *situs* elsewhere; or where he places it in the hands of an agent for collection or renewal, with a view to retaining the money and keeping it invested as a permanent business. . . . The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now here was property within the State, not for a mere temporary purpose, but as permanently as though the owner resided here. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans and the preservation and enforcement of the securities. The laws of New York never operated on it.”

In *Blackstone v. Miller*,<sup>55</sup> the court held that a State may tax the transfer, under the will of a non-resident, of debts due the decedent by its citizens. As to the doctrine that, generally speaking, in matters of succession the law of the domicile of the decedent is recognized in other jurisdictions, the court said: “It hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domi-

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<sup>54</sup> 177 U. S. 133.

<sup>55</sup> 188 U. S. 189.

cile. The title of the principal administrator, or of a foreign assignee in bankruptcy—another type of universal succession—is admitted in but a limited way or not at all. . . . To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession there.”

Distinguishing the doctrine of this case from that in *State Tax on Foreign-Held Bonds* the court said: “The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. (*Bacon v. Hooker*, 177 Mass. 333.) Therefore, considering only the place of the property it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases.”

In *State Board of Assessors v. Comptoir National D'Escompte* <sup>56</sup> it was held that a State is not forbidden by the Federal Constitution to tax credits based upon loans on collateral security made by the local agent of a foreign corporation, the collateral being retained by the agent, and the credits being either in the form of credits on Paris or London, or simply of overdrafts, upon which the customer was charged interest.

In *Buck v. Beach*,<sup>57</sup> however, the court found itself obliged to deny the power of the State of Indiana to tax certain notes which were in the hands of an agent within the State, and which, it appeared, had been placed, together with the mortgages securing their payment, in his hands to escape their taxation in Ohio, but with nothing else to connect them with the State and give them a *situs* there. These notes were given and payable in Ohio by residents of that State, to a resident of New York, for loans made in Ohio on lands there situated. In other words, it was held that notes evidencing debts may not, for taxing purposes, be given a *situs* merely by their actual presence in the State. There must be, in addition, some facts which, aside from the mere fact of their being protected by the police power, will bring them under the operation and protection of the local law. The fact of an attempt to escape proper taxation in Ohio, it was declared, did not confer jurisdiction upon Indiana to tax property not really within its borders.<sup>58</sup>

<sup>56</sup> 191 U. S. 388.

<sup>57</sup> 206 U. S. 392.

<sup>58</sup> In a dissenting opinion, concurred in by Justice Brewer, Justice Day declared: “In view of the recognition of the character of bills and notes as tangible property, it seems to me inaccurate to say that they are mere evidences of debt. They are tangible things, capable of delivery, passing from hand to hand, and for many purposes may be regarded as of the value of the debt which they evidence.”

In *Liverpool, L. & G. Ins. Co. v. Board of Assessors*<sup>59</sup> it was held that a State might tax amounts due a foreign insurance company from its policyholders in the State for premiums on which credit for thirty and sixty days had been extended, but for which credits no notes had been given. To the contention that the State had not the power to tax these credits because they were not evidenced by written instruments, and that, therefore, the instant case was to be distinguished from the earlier cases in which the taxation of credits had been sustained, the court said: "The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.

"The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. *Blackstone v. Miller*, 188 U. S. p. 205. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

In *Fidelity and Columbia Trust Co. v. Louisville*<sup>60</sup> it was held that deposits in a bank in a city where the depositor carried on the business from which the deposits were derived, but not used in such business, might be taxed personally to the depositor in another State irrespective of the fact whether or not such deposits were taxed by the State where located. The court said: "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority, we see nothing to hinder the State from taking a man's credits into account. But, so far from being declared unlawful, it has been decided by this court that whether

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<sup>59</sup> 221 U. S. 346.

<sup>60</sup> 245 U. S. 54.

a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State (*Kirtland v. Hotchkiss*).<sup>61</sup> It is true that the decision in *Kirtland v. Hotchkiss* concerned Illinois bonds and that if they were physically present in the taxing State, a special principle might apply, as explained in *Wheeler v. Sohmer*.<sup>62</sup> But the decision was not made to turn upon such considerations, indeed, its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this court has held the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it. (*Union Refrigerator Transit Co. v. Kentucky*);<sup>63</sup> and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far, and there is opposed to it the long-established practice of considering the debts due to a man in considering his wealth at his domicile for the purposes of this sort of tax."

"The notion that a man's personal property upon his death may be regarded as a *universitas* and taxed as such, even if qualified, still is recognized both here and in England.<sup>64</sup> It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland v. Hotchkiss* has been affirmed or assumed to be law in every subsequent case."

#### § 1260. Incorporeal Hereditaments: Franchises, etc.

Incorporeal hereditaments, such, for example, as corporate franchises, may be taxed only in the State from whose law they are derived, and where, consequently, they have their legal situs.<sup>65</sup> This doctrine is clearly stated in *Louisville & Jeffersonville Ferry Co. v. Kentucky*.<sup>66</sup> In this case it was held that a Kentucky corporation operating a ferry across the Ohio river was deprived of its property without due process of law by the action of the State in including, for purposes of taxation, in the valuation of its franchise derived from Kentucky, the value of a franchise derived from Indiana for a ferry from the Indiana to the Kentucky shore. The court said: "Beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The

<sup>61</sup> 100 U. S. 491. See also *Tappan v. Merchants' National Bank* (19 Wall. 490).

<sup>62</sup> 233 U. S. 434.

<sup>63</sup> 199 U. S. 194.

<sup>64</sup> Citing *Bullen v. Wisconsin* (240 U. S. 625), and other cases.

<sup>65</sup> As to Federal taxation of State-granted franchises, see § 101.

<sup>66</sup> 188 U. S. 385.



taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law . . . as much so as if the State taxed the real estate owned by that company in Indiana."

The court went on to say that it was not called upon to decide and that it express no opinion as to the validity of a law making it a condition of the ferry company's continuing to exercise its corporate powers that it should pay a tax for its property having a situs in another State.

It would seem, however, that the franchise or permission granted a foreign corporation to do business in a State may be taxed as property in that State. Also, of course, a yearly payment by the companies may be required by that State as a condition precedent to doing business in that State, but such payments partake more of the nature of a license fee than of a tax.

As regards a domestic corporation, a State may tax not only its property, and its franchise (valuing that franchise by net or gross receipts) but also may tax, as property, privileges or rights which it may have granted, as, for example, the use of the public streets. The fact that, at the time of the granting of this right or privilege, payment was made therefor by the company, either in the form of a lump sum or a continuing annual amount, does not exempt that right from taxation according to its pecuniary value, any more than does the purchase of a piece of land from the State and payment therefor exempt it from future taxation as property.<sup>67</sup>

### § 1261. Taxation of Good-Will.

That a franchise may be taxed as a piece of property, and that, in estimating the value of this property, the value of the good-will of the company may be included, is clearly established in *Adams Express Co. v. Ohio*.<sup>68</sup>

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<sup>67</sup> *People v. Roberts* (154 N. Y. 101; 159 N. Y. 70).

<sup>68</sup> 166 U. S. 185.

"In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. . . . It matters not in what this intangible property consists,—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

In *State Railroad Tax Cases* (92 U. S. 575, 603), Justice Miller, speaking for the court, said: "That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions,'

In New York *ex rel. Metropolitan Street Railway Co. v. Tax Commissioners*<sup>69</sup> it was held that a tax levied specially upon the franchise of the company as a piece of property of value was not a double tax, because a lump sum had been paid at the time the franchise was granted, and an annual payment of a fixed amount or fixed percentage of earnings, such payments not having been specifically declared to be in lieu of taxes. The fact that for many years the State had not attempted to levy such a special franchise tax was held not to be an estoppel upon the State.

### § 1262. Inheritance Taxes.

It would appear that there are no constitutional limits to the right of the State to determine the conditions under which the right to transmit property, or upon the privilege of taking property by will or descent, may be exercised, or it may abolish such right or privileges altogether. It follows that the States is conceded to have a discretionary right to impose such taxes as it may desire upon the enjoyment of these privileges or rights.<sup>70</sup> These taxes may be upon the transmission or the exercise of the legal power of transmitting property by will or descent;<sup>71</sup> or they may be upon the legal privilege of taking property by devise or descent.<sup>72</sup>

It is clear, then, that, when the taking or the right to take property under a will or by succession is involved the right to tax is exercisable by the State whose laws control the taking or the right to take. Thus, in general, with reference to the estates of non-resident decedents it has been held that, as to property within the State, an inheritance tax may be sustained as one upon the right of succession or as a transfer of title tax. Thus, in *Blackstone v. Miller*,<sup>73</sup> the court upheld a tax upon the transfer, under the will of a non-resident, of debts due the decedent by citizens of the taxing State. The court said: "No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rule of succession from the law of the

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said this court in *Society for Savings v. Coite* (6 Wall. 607), 'than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of a State government.' *State Freight Tax* case (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 232; *State Tax on Gross Receipts* (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 284."

<sup>69</sup> 199 U. S. 1.

<sup>70</sup> *Mager v. Grima* (8 How. 490); *United States v. Perkins* (163 U. S. 625); *Knowlton v. Moore* (178 U. S. 41); *Campbell v. California* (200 U. S. 87).

<sup>71</sup> *United States v. Perkins* (163 U. S. 625); *Plumber v. Coler* (178 U. S. 115); *New York Trust Co. v. Eisner* (256 U. S. 345). The present Federal inheritance tax is upon the right to transmit.

<sup>72</sup> *Magoun v. Illinois T. & S. Bank* (170 U. S. 283); *Knowlton v. Moore* (178 U. S. 41); *Campbell v. California* (200 U. S. 87).

<sup>73</sup> 188 U. S. 189.

domicil, or that by the law of the domicil the chattel is a part of a *universitas* and is taken into account again in the succession tax there. . . . The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. . . . If the transfer of the deposit necessarily depends upon and involves the law of New York [the taxing State in the instant case] for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. . . . It is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor.”<sup>74</sup>

Two comparatively recent cases of great interest with reference to the essential nature of inheritance taxes and as to jurisdiction of the States in relation thereto as concerns property located outside the taxing State is that of *Frick v. Pennsylvania*,<sup>75</sup> decided in 1925, and *Blodgett v. Silberman*.<sup>76</sup> In the *Frick* case and several others grouped with it, the plaintiffs in error contended that, in so far as the Pennsylvania statute sought to tax the transfer of tangible personal property having an actual situs outside the State, the statute was in contravention of the due process of law clause of the Fourteenth Amendment.

The court admitted that this precise question had never before been presented to it, but said that there were many earlier cases which pointed the way to its solution. These cases had shown that the exaction by a State of a tax which it was without power to impose operated as a taking of property without due process of law; that a State cannot give an extra-territorial operation to its tax laws; and that, as to tangible personal property, only that State can tax it within which it has its actual situs, regardless of the domicile of its owner. Other decisions had also shown that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of its owner rests in the State of its situs. The Pennsylvania law in the instant case, the court found, was a tax law and not an escheat law, nor was it a property tax. It was one on the transfer of property on the death of the owner. As applied to tangible personality located outside the State, although its owner was domiciled in the State, the court held that the law could not

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<sup>74</sup> But see *Keeney v. New York* (222 U. S. 525), in which it was held that the prohibitions of the Fourteenth Amendment were not violated by a State law which imposed a tax upon the transfer of property by deed intended to take effect upon the death of the grantor and measured by the value of the property transferred, and when applied to property which, at the time of the grantor's death, and, therefore, when the tax was due, was in another State in the hands of a trustee holding the title and possession by virtue of such deed.

<sup>75</sup> 268 U. S. 473. Four cases were decided under this title.

<sup>76</sup> 277 U. S. 1.

operate. In this respect, said the court, the situation was the same as if the property had been immovable realty. "The jurisdiction possessed by the States of the situs was not partial but plenary, and included power to regulate the transfer both *inter vivos* and on the death of the owner, and power to tax both the property and the transfer." Blackstone v. Miller<sup>77</sup> it was pointed out, had to deal with intangible personalty which has a different footing from tangible property.

In Blodgett v. Silberman<sup>78</sup> the doctrine was reaffirmed that a tax upon all property which passes by will or inheritance is not, essentially, a property tax, but one upon the right or privilege of succession to the property, and that the State of a person's domicile has the constitutional right to impose such a succession tax with regard to intangible personalty even when the evidences of such property are outside of the State at the time of the decedent's death.<sup>79</sup> As to the common-law maxim *mobilia sequuntur personam*, the court said that "it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not." Furthermore, the court said: "This principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction."

In effect, the court decided that intangible personalty, subject to a succession tax at the domicile of the owner, includes: (1) Partnership interests in limited partnerships in another State; (2) United States bonds in safe deposit boxes in another State; (3) Certificates of stock in foreign corporations; (4) Savings bank accounts in another State; (5) Life insurance policies of foreign corporations; but that coins and bank notes, i. e., actual cash, in safe deposit boxes in another State, were not so included.

In Rhode Island Hospital Trust Co. v. Doughton,<sup>80</sup> it was held that a State cannot impose an inheritance tax upon stock of a foreign corporation held by a non-resident merely because the corporation is doing business within the State, and that two-thirds of its property is located there. The court said: "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the State applies as well in the case of a transfer tax as in that of a property tax. A State has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of

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<sup>77</sup> 188 U. S. 189.

<sup>78</sup> 277 U. S. 1.

<sup>79</sup> The court pointed out that the inheritance taxes of four-fifths of the States were predicated upon this right; that the right had been upheld by the courts of the States, and also by the Federal Supreme Court both before and since the adoption of the Fourteenth Amendment. *Carpenter v. Pennsylvania* (17 How. 456); *Orr v. Gilman* (183 U. S. 278); *Keeney v. Comptroller* (222 U. S. 525); and *Bullen v. Wisconsin* (240 U. S. 625).

<sup>80</sup> 270 U. S. 69.

the property devolved or transferred." In denial of the claim that the State had jurisdiction because of the property of the company within its borders, the court said: "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his aliquot share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property." To the suggestion of the State court that the foreign corporation by doing business within the taxing State had become domesticated therein, the Supreme Court said: "So far as the statutes of the State show, it has been authorized to do and does business in the State, and owns property therein and pays a fee for the permission to do so. It has not been reincorporated in the State. It is still a foreign corporation and the rights of its stockholders are to be determined accordingly."

#### § 1263. State Income Taxes.

It is established that States may impose taxes on incomes accruing to non-residents from property, or business carried on, in the State, and enforce the collection of such taxes so far as they are able by the exercise of a just control over persons or property within their several borders; provided, however, that such taxes are not made more onerous upon non-residents than they are upon residents. This, the court said in *Shaffer v. Carter*,<sup>81</sup> is consonant with numerous of its decisions sustaining State taxation of credits due to non-residents.<sup>82</sup>

#### § 1264. Income from Trust Funds.

In *Maguire v. Trefry*,<sup>83</sup> decided in 1920, the court held valid the law of the State of Massachusetts taxing the income of a resident of the State from a trust, administered under the laws of another State, in securities in the possession of the trustee in such other State. "It is true," said the court, "that the legal title of the property is held by the trustees in Pennsylvania. But it is so held for the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership. . . . It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts."

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<sup>81</sup> 252 U. S. 37. See also *Travis v. Yale & Towne Mfg. Co.* (252 U. S. 60), decided at the same time.

<sup>82</sup> Citing *New Orleans v. Stempel* (175 U. S. 309); *Bristol v. Washington County* (177 U. S. 133); *Liverpool Ins. Co. v. Orleans Assessors* (221 U. S. 346).

<sup>83</sup> 253 U. S. 12.

### § 1265. Tax Exemptions and the Obligation of Contracts.

This subject has been considered in Section 763.

### § 1266. Double Taxation.

We have seen that the right of a State to tax depends upon its jurisdiction over the object taxed, and that this jurisdiction is obtained by either actual or constructive presence of the object within the State's territorial limits. This constructive presence applies to personal property and depends upon the principle *mobilia sequuntur personam*. As to personal property it is thus possible that it may actually be in one State and be there taxed, and constructively in another State and there also taxed. The fact that one State has exercised its jurisdiction with reference to a matter, whether of taxation or otherwise, clearly can impose no obligation upon another State not to exercise such jurisdiction as it may have. This the Supreme Court of the United States has repeatedly recognized. In *Coe v. Errol* <sup>84</sup> the court said: "If the owner of personal property resides within a State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also." And in *Blackstone v. Miller* <sup>85</sup> the court said: "No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law."<sup>86</sup>

The double taxation of a piece of property by the same State is, however, forbidden not only by the several constitutions of most of the States, but by the Fourteenth Amendment.

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<sup>84</sup> 116 U. S. 517.

<sup>85</sup> 188 U. S. 189.

<sup>86</sup> Citing *Coe v. Errol* (116 U. S. 517); *Knowlton v. Moore* (178 U. S. 41). See also *Kidd v. Alabama* (188 U. S. 730).

## CHAPTER CIV

### EQUAL PROTECTION OF THE LAWS

#### § 1267. Equal Protection and Due Process.

By the Fourteenth Amendment it is provided: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." No similar express prohibition is directed to the Federal Government by the Fifth Amendment which contents itself with the prohibition relating to due process of law. However, as will have been seen in the chapters which have preceded, this due process clause has been given an interpretation which brings within its scope many forms of arbitrary or unreasonable discriminatory action which might be brought, and, when the States have been concerned, have been brought within the prohibition of denial of equal protection of the laws. Indeed, to such an extent has this been true, that it is still difficult to say precisely in what specific respects the prohibition of the denial of equal protection of the laws operates to impose restraints not already covered by the prohibition with regard to the depriving of persons of life, liberty or property without due process of law.

The fact that the requirement as to due process includes, to a very considerable extent at least, the guarantee of equal protection of the laws, is especially shown in the opinion of the court in *Smyth v. Ames*<sup>1</sup> where it is said: "The equal protection of the laws, which by the Fourteenth Amendment no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of an individual is, without compensation, wrested from him for the benefit of another, or of the public."

The possible distinction between the two prohibitions we find touched upon by Chief Justice Taft in his opinion in *Truax v. Corrigan*.<sup>2</sup> He there said: "It may be that they [the two prohibitions] overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not conterminous. . . . The due process clause . . . of course tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. . . . But the framers and adopters of this [Fourteenth] Amendment were not content to depend

<sup>1</sup> 169 U. S. 466.

<sup>2</sup> 257 U. S. 312.

on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process." Thus, in the instant case, the Chief Justice pointed out that the State statute under examination which prohibited interference by injunctions in disputes between employers and employees concerning terms or conditions of employment resulted in the recognition of one set of actions against ordinary tort feasons and another set against tort feasons in labor disputes. The contention that no one has a vested right to injunctive relief, he said, did not meet the objection that the granting of equitable relief to one man or set of men, and denying it to others under like circumstances and in the same jurisdiction was a denial of the equal protection of the laws.

In *Hayes v. Missouri* <sup>3</sup> the court said of the Fourteenth Amendment that it "does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed." Having quoted this statement, Chief Justice Taft in *Truax v. Corrigan* added: "Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

From what has been said it is clear that, in many cases, laws which have been held invalid as denying due process of law might also have been so held as denying equal protection of the laws, or *vice versa*, and that, in fact, in not a few cases the courts have referred to both prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises.

One of the best general statements of the scope and intent of the provision for the equal protection of the laws is that given by Justice Field in his opinion in *Barbier v. Connolly*,<sup>4</sup> in which, speaking for the court, he said:

"The Fourteenth Amendment in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal pro-

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<sup>3</sup> 120 U. S. 68.

<sup>4</sup> 113 U. S. 27.



tection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits by anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one that such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment. In the execution of admitted powers unnecessary proceedings are often required, which are cumbersome, dilatory and expensive, yet, if no discrimination against anyone be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us, the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual."

**§ 1268. Yick Wo v. Hopkins.**

The case of *Yick Wo v. Hopkins* <sup>5</sup> involved the validity of an ordinance of the City of San Francisco which required all persons desiring to establish laundries in frame houses to obtain the consent of certain municipal officials. Here the law or ordinance was not upon its face discriminatory, but it was held void for the reason that it gave to the designated officials "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons," and because the evidence showed in fact "an administration directed so exclusively against a particular class of persons [the Chinese] as to warrant and require the conclusion that whatever may have been the intent of the ordinances so adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the law which is secured to the petitioners as to all other persons by the broad and benign provisions of the Fourteenth Amendment." The court then went on to declare the general doctrine: "Though the law be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." <sup>6</sup>

**§ 1269. Equal Protection Requirement Directed to State Action.**

The provision of the Fourteenth Amendment guarantees to individuals and to corporations that they shall not by State law be excluded from the enjoyment of privileges which other persons and corporations similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from. But no one is guaranteed that in fact, through the fortuitous operation of a law, which in itself is not discriminative, a special burden may not be imposed, or the enjoyment of a privilege taken away. Thus, for example, in *Strauder v. West Virginia* <sup>7</sup> a State law was held invalid which denied to members of

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<sup>5</sup> 118 U. S. 356.

<sup>6</sup> This principle of interpretation was declared to have been sanctioned in *Henderson v. Mayor* (92 U. S. 259); *Chy Lung v. Freeman* (92 U. S. 275); *Ex parte Virginia* (100 U. S. 339); *Neal v. Delaware* (103 U. S. 370); and *Soon Hing v. Crowley* (113 U. S. 703). See also *Grunding v. Chicago* (177 U. S. 183). But see as to doctrine declared in *Wilson v. Eureka City* (173 U. S. 32). As to the instances in which the vesting of arbitrary powers in administrative officials has been upheld it is to be noted that they have related rather to the granting or withholding of privileges, as, for example, the use of public streets, than to the enjoyment of purely private rights.

<sup>7</sup> 100 U. S. 303.

the colored race the right to act upon juries, the court saying, "the law in the State shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the State." But in *Virginia v. Rives*<sup>8</sup> and other cases<sup>9</sup> it was held that the fact that it happened that no negroes were in fact drawn upon the jury, or *vice versa*, that no whites were so drawn was not constitutionally objectionable, unless it affirmatively appeared that the State officials intrusted with the administration of the law arbitrarily and with intent had given an unequal and discriminating effect to the law.<sup>10</sup>

In other words, as has been earlier pointed out with respect generally to the prohibitions of the Fourteenth Amendment, they are directed against State action and not that of private individuals.

It is, however, to be observed in this connection, that the prohibitions apply to the acts of State officials even when they are not in pursuance of some State legislative direction, for, while no constitutional objection may be made to any law of the State, it has been held that its officials may exercise their public authority in such a discriminatory or arbitrary manner as to bring them within the scope of the prohibitions of the Fourteenth Amendment. This, it will be remembered, was one of the grounds upon which, in *Yick Wo v. Hopkins*<sup>11</sup> it was held that due process of law had been denied. In *Tarrance v. Florida*<sup>12</sup> the administration of a State law and not the law itself was challenged and the court said: "Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law."

However, it would appear that as to whether or not in fact discrimination has been practiced in the administration of a State law, the Supreme Court holds itself almost, if not absolutely, concluded by the finding of the State courts. In *Thomas v. Texas*<sup>13</sup> the court with reference to whether the State jury commissioners had, in the selection of grand and petit juries discriminated against negroes, said: "This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to State courts." And, later on in the same opinion: "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constituted such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opin-

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<sup>8</sup> 100 U. S. 313.

<sup>9</sup> *Neal v. Delaware* (103 U. S. 370); *Bush v. Kentucky* (107 U. S. 110); *Williams v. Mississippi* (170 U. S. 213).

<sup>10</sup> See *Gibson v. Mississippi* (162 U. S. 565).

<sup>11</sup> 118 U. S. 356.

<sup>12</sup> 188 U. S. 519.

<sup>13</sup> 212 U. S. 278.

ion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors."

#### **§ 1270. Equal Protection of the Law Does Not Control the Grant of Political Rights.**

The requirement as to equal protection of the law does not operate to prevent the States from restricting the enjoyment of political privileges to such classes of their citizens as they may see fit.<sup>14</sup>

#### **§ 1271. Disfranchising Clauses of the Constitutions of the Southern States.**

The constitutionality of the disfranchising clauses of certain of the Southern States as tested by the requirement of equal protection of the laws has been particularly considered in an earlier chapter.<sup>15</sup>

#### **§ 1272. Proposed Anti-Lynching Law.**

At various times measures have been proposed and strongly urged in Congress, and sought to be constitutionally justified as enforcements of the prohibition of the Fourteenth Amendment with regard to the denial of the equal protection of the laws, which would declare criminal and therefore subject to Federal jurisdiction, the failure or neglect or refusal of State officials to give adequate protection against mob or riotous violence to persons within the State. Though thus not expressly limited to cases in which persons have been lynched, the proposed laws have been directed to this evil, and hence their popular designation as "Anti-Lynching Laws." A recent example of such a proposed law is that introduced into the 67th and 68th Congresses.<sup>16</sup> The Bill introduced into the 68th Congress was styled "A Bill to Assure Persons within the Jurisdiction of Every State the Equal Protection of the Laws, and to Punish the Crime of Lynching." Section 2 of this Bill declared "That if any State or governmental subdivision thereof fails, neglects, or refuses to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage, such State shall by reason of such failure, neglect or refusal be deemed to have denied to such person the equal protection of the laws of the State." Later sections of the Bill declared criminal and highly punishable the failure, neglect or refusal of any State or municipal officer to make all reason-

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<sup>14</sup> See § 150.

<sup>15</sup> See § 353. However, it may be noted that in the recent case of *Nixon v. Herndon*, (273 U. S. 536), it was held that a State statute making negroes ineligible to participate in primary elections of a political party was unconstitutional as denying to negroes the equal protection of the laws. Such denial, it was declared, was of a substantive character for which damages might be sued for and recovered.

<sup>16</sup> See Senate Rep. 837, 67th Cong., 2d Sess., and H. R. Rep. 71, 68th Cong., 1st Sess.

able efforts to prevent prisoners within their charge from being lynched, or the failure of such officials to perform their duty to apprehend and prosecute to final judgment under the laws of the State all persons participating in such lynching. It was also provided by the Bill that any State or municipal officer having custody or control of a prisoner who should conspire with any person to put such prisoner to death without authority of law or to conspire with any person to suffer such person to be taken or obtained from his custody for such purpose should be guilty of a felony and punishable therefor, as should also those persons who thus conspired with him. The Bill also provided that the Federal District Court of the judicial district in which a lynching should occur should have jurisdiction to try and punish persons participating in the lynching when it should be made to appear to the court that the State officials had failed, neglected, or refused to prosecute to judgment such participating persons. The Bill further provided that any county of a State in which a person should be lynched should forfeit \$10,000.00 which sum might be recovered by an action in the name of the United States against such county for the use of the family, if any, of the person done to death, and, if there should be no family, to the use of the United States. Finally, the Bill provided: "That any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such State or Territory, shall constitute a like crime against the peace and dignity of the United States, punishable in like manner as in the courts of said State or Territory, and within the period limited by the laws of such State or Territory, and may be prosecuted in the courts of the United States, and upon conviction the sentence executed in like manner as sentences upon convictions for crimes under laws of the United States."

It is apparent that a measure such as the above, if enacted, would give rise to several important constitutional questions. The constitutionality of the provision last quoted has been discussed elsewhere in the present treatise.<sup>17</sup> As to the other provisions of the proposed act which have been referred to, it seems reasonably clear from the decisions discussed in the preceding section that, where the officials of the States have been derelict in the performance of their official duties with regard to the protection of persons against lynching, or, it may be said, against any other form of violence, whether to persons or to their property, or has conspired with others to that end, there is ground for saying that there has been a deprivation of life, liberty or property by the State and therefore, that the prohibition of the Fourteenth Amendment has been violated, and therefore, that an act of Congress directed to the punishment of such dereliction would be

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<sup>17</sup> See § 188.

constitutional. Equal protection of the laws would also be denied in cases in which it would appear that such derelictions had been motivated by animosities against persons because of their race, nationality, or because of their inclusion within a certain social or religious or other class, group, or association. It is also probably correct to say that private individuals conspiring with State officials to deny to persons in the custody of State officials due process of law or the equal protection of the laws could be held responsible in the Federal courts, for, in such cases, under the general law of conspiracies according to which all the parties are principals, such private persons would, as to their status, be grouped with the State officials.<sup>18</sup>

Whether it would be constitutional to provide for the trial in the Federal courts of persons participating in lynching, whom the State authorities refuse or neglect to prosecute to judgment, is highly doubtful. Such refusal or neglect to prosecute on the part of the State officials might be considered to violate the Fourteenth Amendment, and, therefore, be Federally punishable, but it is difficult to see how the fact that they had not been effectively proceeded against by the State authorities would operate to bring private individuals within the Federal jurisdiction which, under the Fourteenth Amendment, exists only with reference to violations by the States of the provisions of that Amendment.<sup>19</sup> If such a statutory provision with reference to lynchings were upheld there would seem to be no logical reason why it would not be necessary to uphold statutes with similar provisions which would relate to all cases in which the claim could be substantiated that State officials have been derelict in the performance of their official duties to the detriment of the personal or property rights of private individuals. Authority for the constitutionality of this provision has been sought in the statement of the court in *Virginia v. Rives*<sup>20</sup> that, in the enforcement of the prohibitions of the Fourteenth Amendment, Congress may use its discretion,—“It may secure the right—that is, enforce its recognition—by removing the case from a State court in which it is denied into a Federal court where it will be acknowledged.” It is clear, however, that this declaration had reference to cases already instituted in State courts and in which the Federal right had been denied, and that it would not cover cases in which there has been no State action and which were proposed to be originally brought in Federal courts. Authority has also been sought for this and other provisions of the proposed act by asserting that

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<sup>18</sup> An illustration of this is the holding in *Cohen v. United States* (157 Fed. Rep. 651) in which individuals were held liable under the penal clause of the Federal Bankruptcy Act, for conspiring to secrete property of a bankrupt, though they were not themselves bankrupt and therefore, as such, amenable to the law. Also, in *United States v. Lyman* (190 Fed. Rep. 414) a prisoner was held liable for conspiring with others to effect his own escape, although his escaping was not itself a crime so far as he was concerned.

<sup>19</sup> See especially *James v. Bowman* (190 U. S. 127).

<sup>20</sup> 100 U. S. 313.

there is a "peace of the United States" which is violated in the premises and hence a Federal jurisdictional right to act. This contention can scarcely be maintained since it is well established that there is no peace of the United States which can be violated except in so far as some specific Federal right, privilege, or immunity is violated; and it is also established that the right to life, liberty and property and to equality of protection of the laws are not, in themselves, affirmatively considered, Federal rights; they are, and remain, rights created or recognized by the laws of the States, though the persons enjoying them are Federally guaranteed against their impairment by the States.

A strong case upon this point is that of *United States v. Wheeler*.<sup>21</sup> That case arose out of the forcible deportation by an armed mob of persons from the State of Arizona, and the bringing of indictments against the members of the mob under Section 19 of the Federal Criminal Code which penalizes the conspiring of two or more persons "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." In the instant case it was claimed that the deported individuals had been denied the right to reside and remain peacefully in the State, and that immunity from the violation of this right was Federally guaranteed to them. The Supreme Court, however, held this contention to be without ground, citing *Paul v. Virginia*,<sup>22</sup> *Ward v. Maryland*,<sup>23</sup> and the *Slaughter House* cases.<sup>24</sup> The court said: "Undoubtedly the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States, had, prior to the Confederation, a twofold aspect: (1) as possessed in their own States, and (2) as enjoyed in virtue of the comity of other States. But although the Constitution fused these distinct rights into one by providing that one State should not deny to the citizens of other States rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one State in another of rights possessed in that State by its own citizens was a violation of a right afforded by the [Federal] Constitution. This is the necessary result of Article 2, Section 2, which reserves to the several States authority over the subject, limited by the restrictions against State discriminatory action, hence excluding Federal authority except where invoked to enforce the limitation, which is not here the case." This reasoning and conclusion would seem to be fully applicable to the provisions of the proposed Anti-Lynching Act.

The constitutionality of the provision imposing upon a county in which a lynching occurs a penalty recoverable in a suit by the United States against the county is also not free from constitutional doubt. The ques-

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<sup>21</sup> 254 U. S. 281.

<sup>22</sup> 8 Wall. 168.

<sup>23</sup> 12 Wall. 418.

<sup>24</sup> 16 Wall. 36.

tion is an open one in the sense that there have been no adjudications of it by the Supreme Court, but the suit to recover the penalty or damages would be a suit against the State unless it could be held that the county, as regards the general enforcement of law, is to be viewed as acting on its own local behalf and not as an agency of the State.

**§ 1273. Reasonable Classifications by Law Not a Denial of Equal Protection.**

It will have been seen that the requirement of equal protection of the law applies to all persons similarly situated or circumstanced. Hence, where there are rational grounds for so doing, persons or their properties may be grouped into classes to each of which specific legal rights of liabilities may be attached. This legislative discretionary right applies to the exercise of all of the powers of the States,—to their taxing and police powers as well as to their other powers.

Thus, for example, the practice of certain professions may be limited to persons of the male sex, or to those of a certain age, or to those possessing other qualifications that may reasonably be held to indicate a fitness for the profession.<sup>25</sup>

There have been many cases upon this point, but it will be sufficient to refer to one or two of the more recent of them.

In *Graves v. Minnesota* <sup>26</sup> it was held that refusal to grant a license to practice dentistry to persons not possessing a diploma from a dental college of good standing was not unconstitutional as making an unreasonable classification between those possessing such a diploma and those without it. "Clearly," said the court, "the fact that an applicant for a license holds a diploma from a reputable dental college has a direct and substantial relation to his qualification to practice dentistry."<sup>27</sup>

In *Hayman v. Galveston* <sup>28</sup> it was held that an osteopathic physician was not denied due process of law or the equal protection of the laws by being excluded from the privileges of a hospital maintained by the State or by a political subdivision thereof, the use of which was reserved for purposes of medical instruction. The court said: "The only protection claimed here is that of appellant's privilege to practice his calling. However extensive that protection may be in other situations, it cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a State or a political subdivision,

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<sup>25</sup> *Re Lockwood* (154 U. S. 116); *Broadwell v. Illinois* (16 Wall. 130).

<sup>26</sup> 272 U. S. 425.

<sup>27</sup> Generally, as to the power of the States in the exercise of their police powers, to require qualifications for the practice of medicine or dentistry, see *Dent v. W. Virginia* (129 U. S. 114); *Douglas v. Noble* (261 U. S. 165). As to State decisions, see cases cited in the court's opinion in *Graves v. Minnesota* (272 U. S. 425).

<sup>28</sup> 273 U. S. 414.



the use of which is reserved for purposes of medical instruction. It is not incumbent on the State to maintain a hospital for the private practice of medicine." As to permitting the privilege to other physicians but denying it to osteopathic physicians, the court said that the classification was not, upon its face, an arbitrary or unreasonable one. "In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the State board whose action is challenged is not a denial of the equal protection of the laws."

As proper police measures, the States are permitted to impose special restrictions and liabilities upon railway corporations. Special modifications of the common-law doctrine of employer's liability with reference to them have been upheld, as have laws placing the presumption of negligence upon them when cattle have been killed by their trains, and laws making them responsible for fires kindled by sparks from their locomotives, though they may have taken every possible precaution to avoid such fires.<sup>29</sup>

However, in *Gulf, etc., Ry. Co. v. Ellis*<sup>30</sup> a State law was held void which imposed an attorney's fee in addition to costs upon railway companies which should fail to pay certain claims within a certain time after presentation. Here the court held that there was no reasonable relation between the burden imposed and the peculiar character of the business done.<sup>31</sup>

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<sup>29</sup> See especially *St. Louis, etc., Co. v. Mathews* (165 U. S. 1); *Missouri Pacific Ry. Co. v. Mackey* (127 U. S. 205).

<sup>30</sup> 165 U. S. 150.

<sup>31</sup> The opinion declared: "A mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of rail-roading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while, in certain cases, there may be a peculiar obligation which may be enforced with penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency. Neither can it be sustained as a proper means of enforcing the payment of small debts, and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors, and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained."

In *Atchison, T. & S. F. R. Co. v. Mathews*<sup>32</sup> however, a State statute was held not to deny equal protection of the laws which required a reasonable attorney's fee for the plaintiff to be allowed and made a part of a judgment against a railroad company for damages from fires caused by the operation of its trains. Distinguishing the case from that of *Gulf, etc. Ry. Co. v. Ellis*, the court found the questioned statute to be one of a police character, designed to induce upon the part of railway companies greater care to prevent injuries, the likelihood of which is peculiar to the operations carried on by them.<sup>33</sup>

In *McLean v. Arkansas*<sup>34</sup> it was held that the exemption of coal mines not employing ten or more men from the operation of a State law with regard to wages contracts was not a denial of the equal protection of the laws. "We cannot say," said the court, "that there was no reason for exempting from its [the law's] provisions mines so small as to be in the experimental or formative state, and affecting but a few men, and not requiring regulation in the interest of the public health, safety, or welfare."

In *Jeffrey Mfg. Co. v. Blagg*<sup>35</sup> it was held that equal protection of the laws was not denied by a law which provided that employers having five or more employees should be subject to the requirements of a State workmen's compensation law to which other employers were not subjected.

In *Middleton v. Texas Power and Light Co.*<sup>36</sup> it was held that equal protection of the laws was not denied by a workmen's compensation act which excluded from its operation domestic servants, farm laborers, employees of railways, laborers working cotton gins, and employees of persons employing no more than five employees. A reasonable ground for such exclusions was found by the court, or, at least, it was not willing to overturn the judgment of the legislature that such reasonable grounds existed.

It is clear, then, that, while classification of persons and businesses for purposes of regulation is not prohibited by the requirement of equal protection of the law, these classifications must in every case be reasonable ones. In *Gulf, etc., Ry. Co. v. Ellis*, already cited, it was declared: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

In *Power Mfg. Co. v. Saunders*<sup>37</sup> a State law was held to deny the equal

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<sup>32</sup> 174 U. S. 96.

<sup>33</sup> Justice Harlan dissented in a long and able opinion.

<sup>34</sup> 211 U. S. 539.

<sup>35</sup> 235 U. S. 571.

<sup>36</sup> 249 U. S. 152.

<sup>37</sup> 274 U. S. 490.

protection of the laws which permitted foreign corporations doing business in one county of the State to be sued in other counties where it did no business and had no office, officer or agent, on a cause of action arising in the county where it did business, such permission not being granted with reference to domestic corporations.

The court pointed out that the prohibition with regard to the denial of equal protection applies to corporations as well as to natural persons, that the instant discrimination was a real and substantial one, and that it had no reasonable relation to the subject of the legislation in question. The court said: "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible; the distinguishing principle being that classifications must rest on differences pertinent to the subject in respect of which the classification is made."

In *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*<sup>38</sup> the court held that equal protection was denied by a State law which provided that a non-resident corporation going into a State to recover possession of property wrongfully taken from it and taken into the State should be required, without service of process, to send its officers into the State and submit to examination before trial under penalty of dismissal of the suit, residents of the State being required to submit to examination only in the counties of their residence, and service of process upon them being required before examination. The court said: "No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files, and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination

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<sup>38</sup> 262 U. S. 544.

should be had in the county of their residence, no matter what its distance from the place of suit."

In Ohio *ex rel. Clarke v. Dekebach* <sup>39</sup> it was held that equal protection was not denied by a municipal ordinance which forbade the issuance of pool or billiard room licenses to aliens.<sup>40</sup> The court said: "The regulation or even prohibition of the business is not forbidden (*Murphy v. California*, 225 U. S. 225). The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be well satisfied that this premise is well founded in experience. . . . It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong."<sup>41</sup> Some latitude must be allowed for the legislative appraisal of local conditions and for the legislative choice of methods for controlling an apprehended evil."<sup>42</sup>

In New York *ex rel., Bryant v. Zimmerman et al.*,<sup>42a</sup> it was held that equal protection of the laws was not denied by a State law which provided that every existing membership, corporation or unincorporated association having a membership of twenty or more persons and requiring an oath as a condition of membership "other than a labor union or a benevolent order mentioned in the Benevolent Orders Law, should file with the Secretary of State sworn copies of its constitutions, by-laws, roster of members, etc. In this case the offence charged against the relator was his attendance upon the meetings and his membership of a Klu Klux Klan which had not complied with the law.

#### § 1274. State Laws and Judicial Systems Not Required to Be Uniform throughout the State.

In *Missouri v. Lewis* <sup>43</sup> the important principle was laid down that the equal protection clause of the Fourteenth Amendment does not prevent the application by a State of different laws and different systems of judicature to its various local subdivisions. In this case was questioned the constitutionality of a law providing a special court of appeals with exclusive jurisdiction for the City of St. Louis and a few specified counties. To the

<sup>39</sup> 274 U. S. 392.

<sup>40</sup> The ordinance was held not to violate a treaty regulating commerce between the United States and a foreign nation which guaranteed reciprocal liberties of commerce between the territories of the signatories, and that the merchants and traders of each nation should enjoy complete protection and security for their commerce.

<sup>41</sup> Citing *Ft. Smith Light and Traction Co. v. Board of Improvement* (274 U. S. 387).

<sup>42</sup> Citing *Patson v. Pennsylvania* (232 U. S. 138).

<sup>42a</sup> Decided November 19, 1928.

<sup>43</sup> 101 U. S. 22.

claim that this law denied to the people of these districts the equal protection of the laws in that they were denied access to the general court of appeals of the State the Supreme Court replied: "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. . . . The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. . . . Diversities which are allowable in different States are allowable in different parts of the same State."

**§ 1275. Segregation: Race Discriminations: Equal Protection Requires Similar but Not the Same Privileges.**

Where similar or substantially similar conveniences and comforts are offered, transportation companies, inns, theatres, and other public service companies may by law be permitted or required to provide separate accommodations to the different races, colored, Asiatic, or white.<sup>44</sup>

In *Plessy v. Ferguson*<sup>45</sup> the court said: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law; and in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, or even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

So far as interstate commerce is concerned, it was held in *Chiles v. Chesapeake & O. R. Co.*<sup>46</sup> that congressional inaction in the premises is equivalent to a declaration that carriers may, by regulations adopted by themselves, segregate white and negro passengers in separate coaches or in different divisions of the same coaches.

In *McCabe v. Atchison, T. & S. F. R. Co.*<sup>47</sup> it was held that a State statute providing for the segregation of whites and negroes on railway trains would have to be confined in its application wholly to intrastate transportation in order to prevent its being an unconstitutional regulation of interstate commerce, and that so much of the law as provided for sleeping, din-

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<sup>44</sup> *Plessy v. Ferguson* (163 U. S. 537); *C. & O. Ry. Co. v. Kentucky* (179 U. S. 388). The States may not, however, thus attempt the regulation of interstate transportation.

<sup>45</sup> 163 U. S. 537.

<sup>46</sup> 218 U. S. 71.

<sup>47</sup> 235 U. S. 151.

ing and chair cars exclusively for white persons without providing for similar accommodations for negroes was a denial of the equal protection of the laws. The argument that there was not a sufficient number of negro passengers to justify, from a revenue point of view, the provision of separate and similar accommodations for them, the court declared without merit. The court said: "It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

However, in *Cumming v. County Board of Education* <sup>48</sup> it was held that equal protection was not denied by a Board of Education which, while maintaining a high school for white children, did not maintain one also for colored children for the reason that the funds available were not sufficient to maintain one in addition to the needed primary schools for colored children. The court, looking to the realities of the situation, said: "The colored children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children. The Board had before it the question whether it should maintain under its control, a high school for about sixty colored children or withhold the benefits of education in primary schools from three hundred children of the same race. . . . Its decision was in the interest of the greater number of colored children. . . . We are not permitted by the record to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored children of the county on account of their race."

In *Berea College v. Kentucky* <sup>49</sup> the court upheld a State law, when applied to a corporation as to which the State had reserved to itself the power to alter, amend or repeal its charter, which prohibited the teaching of white and negro pupils in the same institution. The statute was held to be in effect, if not in terms, an amendment of the College's charter, and, as thus viewed, its constitutionality sustained against the charge that the exercise of private rights was unduly, and therefore unconstitutionally, restrained.

In *South Covington & C. Street R. Co. v. Kentucky* <sup>50</sup> it was held that a street railway company might be compelled by statute to furnish either separate cars or separate compartments in the same car for white and negro passengers. This State authority was scarcely questioned in this case, the only constitutional issue being as to whether or not, in the instant case, interstate commerce was interfered with.

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<sup>48</sup> 175 U. S. 528.

<sup>49</sup> 211 U. S. 45.

<sup>50</sup> 252 U. S. 399.

**§ 1276. Municipal Segregation Residence Ordinances.**

In a considerable number of cities ordinances have been issued having for their purpose the segregation of white persons and negroes, so far as the places of their residence are concerned, in specially designated areas or districts. These ordinances have had to meet not only the constitutional objection that they deny due process of law by placing, without sufficient police justification, restraint upon the use of private property, but that they deny either to white persons or to the negroes the equal protection of the laws. In general, the effort has been made to avoid the first objection by showing, or alleging, that the ordinances have a police justification in that they tend to prevent breaches of the peace between white persons and the negroes, or, at least, that they tend to prevent social friction and discord. The second constitutional objection,—that relating to equal protection of the laws,—they have sought to avoid by making the measures, upon their face at least, non-discriminatory, that is, placing the same or equivalent restrictions upon white persons as are placed upon the negroes.

In general, these efforts to avoid Federal as well as State constitutional prohibitions have been crowned with success so far as the State courts are concerned.<sup>51</sup> However, in *Buchanan v. Warley*<sup>52</sup> the movement for segregation received a serious set-back from the Supreme Court. The ordinance involved in that case classified the blocks of the city upon the basis of the relative number of residences and places of public assembly for negroes as compared with those for white persons and prohibited any white or colored person from taking up his residence or establishing and maintaining any place of public assembly in any block upon which the greater number of houses were already occupied by persons of the opposite race. The instant suit was one by the plaintiff, a white man, for specific performance of a contract for the purchase of a piece of real estate, the defendant, a negro, attempting to justify his refusal of performance on the ground that he should not be compelled to accept a deed unless he had, under the laws of the State and of the City, the right to occupy the premises as a residence. The ordinance was declared invalid as a denial of due process of law, rather than as unconstitutionally discriminatory. The court said: "The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the

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<sup>51</sup> *State v. Gurry* (121 Md. 534); *Hopkins v. Richmond* (117 Va. 692); *State v. Darnell* (166 N. C. 300); *Carey v. Atlanta* (143 Ga. 192); *Buchanan v. Warley* (165 Ky. 559).

<sup>52</sup> 245 U. S. 60.

preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law." <sup>53</sup>

### § 1277. Discriminations against Aliens.

In *Atkin v. Kansas* <sup>54</sup> as has been earlier pointed out, it was held that the States might prescribe the conditions under which public work might be done for themselves or for their municipalities, and, therefore, might limit the hours of adult labor thereupon. In *Truax v. Raich*,<sup>55</sup> however, a State law was held to deny to aliens the equal protection of the laws which provided that every employer in the State employing more than five workers at any one time regardless of the kind or class or work or sex of the workers, should employ not less than eighty per cent qualified electors or native-born citizens of the United States. The court asserted that the police power of the State, broad and comprehensive as it is, does not make it constitutionally possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. "It requires no argument to show," said the court, "that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . . It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved."

In *Heim v. McCall* <sup>56</sup> decided a few weeks after the *Truax* case, it was held that equal protection or due process was not denied by a State law which provided that only citizens of the United States might be employed on the construction of public works by or for the State or by or for one of

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<sup>53</sup> For a criticism of the case see the article, "The Constitutionality of Segregation Ordinances," by S. S. Field in 5 *Virginia Law Review*, 81.

<sup>54</sup> 191 U. S. 207.

<sup>55</sup> 239 U. S. 33.

<sup>56</sup> 239 U. S. 175.



its municipalities, and that, in such employment, citizens of the State of New York should be given preference over other citizens of the United States. The authority relied upon was *Atkin v. Kansas* <sup>57</sup> the court saying of that case: "In all particulars except one the case was the prototype of this [the instant] case. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much the essence of the right regulated as the other, that is, the same elements are in both cases,—the right of the individual employer and employee to contract as they shall see fit; the relation of the State to the matter regulated; that is, the public character of the work."

It is submitted that this comparison hardly did justice to the dissimilarity of the two cases. "There is . . . a fundamental distinction between a statute conferring benefits on laborers on public works, leaving everyone an equal opportunity to obtain such employment, and one absolutely prohibiting a fixed class of persons from obtaining such employment. In the former there is no discrimination from which any laborer suffers. In the latter there is such discrimination." <sup>58</sup>

In *Crane v. New York*,<sup>59</sup> decided at the same time as *Heim v. McCall*, was upheld a provision of the New York law which made it a misdemeanor to employ aliens on public works. If, in support of the holding in these two cases, it be said that, the States, being recognized to have a general constitutional right to regulate work by themselves or in their behalf, can impose such conditions as they may see fit, reasonable or unreasonable, impartial or discriminatory, the answer of course is, as has been held with respect to other constitutional powers of the States, that such powers may not be so exercised as to deny or violate Federal rights, privileges, or immunities.<sup>60</sup>

### § 1278. Philippine Bookkeeping Act.

In *Yu Cong Eng v. Trinidad* <sup>61</sup> was involved the constitutionality of a statute of the Government of the Philippine Islands which prohibited Chinese merchants doing business in the Islands from keeping any account books except in the English or Spanish language, or in a local dialect. The requirement was attempted to be defended as a reasonable one for the purpose of assessing taxes. The court found that the act, if enforced, would

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<sup>57</sup> 191 U. S. 207.

<sup>58</sup> This quotation is taken from the article by T. R. Powell, "The Right to Work for the State," in 16 *Columbia Law Review*, 99.

<sup>59</sup> 239 U. S. 195.

<sup>60</sup> As to the justification of laws or ordinances which deny to aliens the right to sell intoxicating liquors, based upon the premise that such business is of a special character and peculiarly subject to control under the police power, see note in 12 *Columbia Law Review*, 737.

<sup>61</sup> 271 U. S. 500.

so seriously embarrass the Chinese merchants as to drive many of them out of business, and that there was no doubt that the act, as a fiscal measure, was chiefly directed against such merchants. The discussions had in the Philippine legislature with reference to the proposed repeal of the act, said the court, left no room for doubt upon that point. After observing that it was not bound by the construction given to the act by the courts of the Islands, the Supreme Court said that it could not give to the Book-keeping Act any other meaning than that imported by its plain language, and that, as thus construed, its effect would be to deny to Chinese merchants both due process of law and the equal protection of the laws. The court said: "Of course, the Philippine government may make every reasonable requirement of its taxpayers to keep proper records of their business transactions in English or Spanish or Filipino dialect by which an adequate measure of what is due from them in meeting the cost of government can be had. How detailed those records should be, we need not now discuss, for it is not before us. But we are clearly of opinion that it is not within the police power of the Philippine legislature, because it would be oppressive and arbitrary to prohibit all Chinese merchants from maintaining a set of books in the Chinese language, and in the Chinese characters and thus prevent them from keeping advised of the status of their business and directing its conduct. . . . Without them such merchants would be a prey to all kinds of fraud and without possibility of adopting any safe policy."

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## CHAPTER CV

### EQUAL PROTECTION OF THE LAWS AND STATE TAXATION

#### § 1279. Equality in Taxation.

The requirement of the Fourteenth Amendment that the States shall not deny to any persons within their several jurisdictions the equal protection of the laws is, of course, operative in the field of taxation. No similarly phrased obligation is laid upon the Federal Government, but the provision of the Fifth Amendment forbidding the taking of property without due process of law imposes an obligation broad enough to cover all or nearly all cases of unequal protection of the laws. And, furthermore, as to indirect taxes it is specifically provided that they shall be uniform throughout the United States.

Whether or not the equal protection of the laws is included within the general prohibition against the taking of life, liberty, or property without due process of law, the provision for equal protection does certainly mark off a specific right or a group of rights within the general field of rights against the violation of which by the States he is guaranteed by the Constitution. That this protection applies within the field of taxation is well established. A case clearly stating this doctrine is that of *County of Santa Clara v. S. Pacific R. R. Co.*,<sup>1</sup> in which Justice Field rendered the opinion. "With the adoption of the Fourteenth Amendment," Field declared, "the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be accessible to him, but that no one shall be subject to any burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement or pleasure. . . . No State—such is the sovereign command of the whole people of the United State—no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law, and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the law. Unequal taxation, so far as it can be prevented is therefore, with other unequal burdens, pro-

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<sup>1</sup> 18 Fed. Rep. 385.

hibited by the Amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition."

As has been already noted, the determination as to when a tax shall be levied and upon what persons and property, and by what rule it is to be assessed and by what means collected is a legislative function. However, in levying an *ad valorem* tax, the legislature may not determine the assessment value of particular pieces of property. So also it follows that while the legislature may, within its discretion, determine freely what occupations, or classes of property or persons are to be taxed, it may not select out from the general mass of property, or general citizen body, particular pieces of property or particular individuals to bear the burden of the tax. When, therefore, a tax is laid upon certain classes of property or of persons, there must be some reasonable basis for the classifications adopted. By this is meant that there must be some substantial reason why the units, whether of property or of individuals, should be treated as distinct groups.

In *Bell's Gap Railroad Co. v. Pennsylvania* <sup>2</sup> was involved the validity of a State law which levied a certain tax on all moneyed securities according to their actual value, except that, as to all bonds and other securities issued by corporations, their nominal or par value should be the basis. It being argued that this violated the requirement of the Fourteenth Amendment as to the equal protection of the laws, the court said: "But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general us-

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<sup>2</sup> 134 U. S. 232.

age, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the States to adopt an iron rule of taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt."

In *American Sugar Refining Co. v. Louisiana*<sup>3</sup> it was held that the equal protection of the laws was not denied by a license tax imposed upon manufacturers of sugar, but exempting from its operation those who refined the products of their own plantations. The opinion declared: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend on differences of color, race, nativity, religious opinions, political affiliation, or other consideration having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

### § 1280. Uniformity in Taxation.

Granting the right of the legislature to classify persons and property for purposes of taxation, the requirements of due process of law and of the additional provision found in the Federal Constitution and in almost all if not in all of the State Constitutions that all laws shall be uniform, make it necessary that the assessments of all persons and property within the class or district selected for taxation shall be according to a uniform rule. Cooley states the principle as follows: "As to all taxation apportioned upon property, there must be taxing districts and within these districts the rule of absolute uniformity must be applicable. A State tax must be apportioned through the State, a county tax through the county, a city tax through the city; while in cases of local improvements, benefiting in a spe-

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<sup>3</sup> 179 U. S. 89.

cial and peculiar manner some portion of the State or of a county or city, it is competent to arrange a special taxing district within which the expense shall be apportioned.”<sup>4</sup> And again: “The rule of apportionment must be uniform throughout the taxing district, applicable to all alike, but the legislatures have no power to arrange taxing districts arbitrarily, and without reference to the great fundamental principles of taxation that the burden must be borne by those upon whom it justly rests. The Kentucky and Iowa decisions held that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all.”<sup>5</sup>

All that the rule of uniformity requires is this, that within the classes or districts taxed the law shall operate according to a uniform rule. Thus, for example, it has been generally held that a city levying a general tax may not discriminate between different wards or sections, for all property within a taxing district must be taxed alike.<sup>6</sup>

Connolly v. Union Sewer Pipe Co.,<sup>7</sup> was not concerned with taxation, but, in the course of its opinion the court found occasion to say, *obiter*: “A tax may be imposed upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. . . . A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States.”<sup>8</sup>

### § 1281. Recent Cases.

The number of cases in which the validity of State laws has been contested upon the ground that they have been so unequal or discriminatory in their operation as to bring them within the terms of the prohibition of the Fourteenth Amendment with regard to the denial of the equal protection of the law has been so great that it will not be feasible, nor would it be

<sup>4</sup> Cooley, *Const. Lim.*, 7th ed., 711.

<sup>5</sup> *Const. Lim.*, 7th ed., 724. The cases referred to are *Morford v. Unger* (8 Iowa, 82); *City of Covington v. Southgate* (15 B. Monr. 491); *Arbegust v. Louisville* (2 Bush, 271); *Swift v. Newport* (7 Bush, 37).

<sup>6</sup> This does not hold true where, by special contract made at the time a rural district is incorporated into the city, special treatment with reference to taxation has been promised. The exemption of certain pieces of property from taxation where this exemption has been for some public purpose or in return for consideration received, does not violate this principle.

<sup>7</sup> 184 U. S. 540.

<sup>8</sup> Generally upon the subject of classifications, see *Barbier v. Connolly* (113 N. Y. 27); *Home Ins. Co. v. New York* (134 U. S. 594); *Magoun v. Illinois T. & S. Bank* (170 U. S. 283); *Orient v. Daggs* (172 U. S. 557); *Tinsley v. Anderson* (171 U. S. 101).

to any great purpose, to refer individually to all of them. In the sections which follow, therefore, the attempt will not extend further than to the mention of some of the more illuminating of these cases, and especially to those of more recent decision.<sup>9</sup>

In *Southwestern Oil Co. v. Texas* <sup>10</sup> it was held that wholesale dealers in oil were not denied equal protection by an occupation tax which was not exacted of wholesale dealers in such other articles of merchandise as sugar, bacon, coal, iron, etc.

In *Engel v. O'Malley* <sup>11</sup> it was held that equal protection was not denied by a license tax law which exempted from its operation private bankers in whose business the average deposits were less than five hundred dollars, but which included in its operation other private bankers.

So, also, in *Citizens Telephone Co. v. Fuller* <sup>12</sup> it was held that an *ad valorem* State law was not invalidated by reason of the exemption from its operation of telephone companies whose gross annual receipts were not in excess of five hundred dollars. The court pointed out that the discrimination was not a clear and hostile one against particular persons or classes, but that, in fact, it rested upon a reasonable basis. "It is not," said the court, "a distinction based on mere size only, as contended by appellant, nor upon the mere amount of business done. There is a difference in the doing of the business and its results; a difference in the relation to the public. Indeed, the non-taxed companies are subsidiary to the taxed companies,—patrons, in a sense, of the taxed companies. The use of the untaxed property, as pointed out by the district court, is 'predominately private, while the use of the taxed property is correspondingly public; the exempt property is used for the personal convenience of the owners, while the taxed property represents commercial investment for profit-making purposes.'"

In *Heisler v. Thomas Colliery Co.* <sup>13</sup> it was held that there was a distinction between anthracite and bituminous coal sufficient to warrant a difference in treatment of them in the matter of taxation.

In *Oliver Iron Mining Co. v. Lord* <sup>14</sup> it was held that owners and lessees who mined their own iron might be taxed although contractors who prepared the ground for mining or who mined or loaded the iron were not taxed.

In *Raley and Bros. v. Richardson* <sup>15</sup> it was held that a specific tax might be levied upon brokers and commission merchants engaged in domestic business although brokers and commission merchants exclusively engaged in interstate commerce were not so taxed. The court said: "It would be

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<sup>9</sup> For a public account and criticism of these cases the reader may consult the articles of Professor T. R. Powell, "Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922-1927," in 12 *Virginia Law Review*, pp. 441 and 546.

<sup>10</sup> 217 U. S. 114.

<sup>11</sup> 219 U. S. 128.

<sup>12</sup> 229 U. S. 322.

<sup>13</sup> 260 U. S. 245.

<sup>14</sup> 262 U. S. 172.

<sup>15</sup> 264 U. S. 157.

a strange application of the equality provision of the Fourteenth Amendment to say that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the State observe the rule of equality among the persons subject to its taxing power."

In *Air-Way Electric Appliance Corp. v. Day* <sup>16</sup> was involved the constitutionality of a State law which levied a franchise fee upon a foreign corporation for the privilege of exercising its franchises within the State, the amount of the fee being measured by a percentage upon the proportion of the authorized capital stock of the corporation, which stock was much in excess of the amount actually issued. This tax was held to be not only to violate the commerce clause (the corporation being engaged in interstate commerce) but to violate the equal protection provision of the Fourteenth Amendment. As to this latter frailty of the law, the court pointed out that the fee as fixed by the State officers was arbitrary in amount. The court said: "without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. . . . The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. . . . The act, in its practical operation, does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances."

In *Louisville Gas & Electric Co. v. Coleman* <sup>17</sup> the equal protection provision of the Fourteenth Amendment was held to have been violated by a State tax upon mortgages lodged for record which excepted from its application mortgages maturing within five years. The law was held not to violate this provision by reason of the fact that mortgages were issued to building and loan associations. The court said as to the feature found to be unconstitutional: "The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in sixty months, and the other in fifty-nine months. No doubt the State may take into consideration as an element in fixing the *amount* of the tax the time within which the indebtedness is to be paid; for, since the tax is a flat sum covering the entire life of the lien, the privilege of recording the short-time lien and that of recording the long-time lien have different taxable values. But classification good for one purpose may be bad for another; and it does not follow that because the State may clas-

<sup>16</sup> 266 U. S. 71.

<sup>17</sup> 277 U. S. 32.



sify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.

"Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

As to the exemption of building and loan associations from the operation of the law, the court pointed out that they were subject to special regulations and obligations and had special and *quasi*-public purposes, and, therefore, that they might reasonably be placed in a separate class for purposes of *ad valorem* taxation.<sup>18</sup>

In *Quaker City Cab Co. v. Pennsylvania* <sup>19</sup> the court held that a State tax upon the receipts of corporations operating taxicabs, which was not levied upon individuals or partnerships engaged in the same business, denied to such corporations the equal protection of the laws. The court said: "Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else. . . . The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of receipts or in the situation or character of the property employed." <sup>20</sup>

### § 1282. State Inheritance Taxes and Equal Protection.

So-called inheritance taxes, that is to say, taxes collected from persons receiving property by inheritance, are levied in many of the civilized States of the world. In the United States they have several times been imposed by Federal law, and at present they are to be found in a considerable majority of the States. In many cases these taxes have been progressive, the

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<sup>18</sup> Justices Holmes, Brandeis and Stone dissented as to invalidity of the provision exempting mortgages maturing within five years.

<sup>19</sup> Decided May 28, 1928.

<sup>20</sup> Justices Holmes, Brandeis and Stone dissented.

rate being higher for larger than for smaller bequests, and collateral heirs often taxed more heavily than direct descendants. In most cases small inheritances have been wholly exempted from the operation of the tax, as have been also bequests and inheritances of real estate. In some cases State inheritance tax laws have been held questioned because containing some special obnoxious provisions, but the ground upon which they have usually been attacked has been that they have violated the requirements of equality and uniformity, because of their progressive features, and because of the exemptions referred to above. In general, however, the laws have been upheld.<sup>21</sup>

In many cases the classifications of the State laws have been upheld as reasonable in themselves, but fundamentally the principle upon which the validity of the laws has been sustained is that an inheritance tax is not a tax upon the property inherited but upon the right to inherit; and that, inasmuch as this is a right which exists only by statute, it is one that may be regulated at the will of the legislature which creates it.<sup>22</sup>

A leading case in the Federal courts as to the constitutionality of a State

<sup>21</sup> The constitutionality of laws exempting small estates is asserted in *State v. Clark* (30 Wash. 439); *State v. Alston* (94 Tenn. 674); *In re Wilmerding* (117 Cal. 281); *Estate of Stanford* (126 Cal. 112); *State v. Hamlin* (86 Me. 495); *Minot v. Winthrop* (162 Mass. 113); *Crocker v. Shaw* (174 Mass. 266); *Gelsthorpe v. Furnell* (20 Mont. 299); *High v. Coyne* (93 Fed. Rep. 450); *Morris' Estate* (50 S. E. Rep. 682); *Union Trust Co. v. Wayne* (125 Mich. 487); *Ferry v. Campbell* (110 Iowa, 290); *Hickok's Estate* (Vt.) (62 Atl. Rep. 724); *Frothingham v. Shaw* (175 Mass. 59); *Appeal of Nettleton* (56 Atl. Rep. 565); *Estate of Magnes* (32 Colo. 527); *Pullen v. Commissioners of Wake Co.* (66 N. C. 361); *Black v. State* (113 Wis. 205).

The constitutionality of a law discriminating between lineal and collateral descendants and between relatives and strangers in blood has been sustained in the following cases: *State v. Alston* (94 Tenn. 674); *State v. Henderson* (160 Mo. 190); *State v. Clark* (30 Wash. 439); *Hagerty v. State* (55 Ohio, 613); *Nunnemacher v. State* (129 Wis. 190); *In re McPherson* (104 N. Y. 306); *State v. Hamlin* (86 Me. 495); *Minot v. Winthrop* (162 Mass. 113); *Billings v. State* (189 Ill. 472); *State v. Dalrymple* (70 Md. 294); *Tyson v. State* (28 Md. 577); *Eyre v. Jacob* (14 Gratt. 422); *Gelsthorpe v. Furnell* (20 Mont. 299); *Wallace v. Myers* (38 Fed. Rep. 184); *Union Trust Co. v. Wayne* (125 Mich. 487); *Frothingham v. Shaw* (175 Mass. 59); *Appeal of Nettleton* (56 Atl. Rep. 565); *Estate of Magnes* (32 Colo. 527); *Pullen v. Commissioners of Wake Co.* (66 N. C. 361); *Estate of Campbell* (143 Cal. 623); *Thompson v. Kidder* (N. H.) (65 Atl. Rep. 392).

The constitutionality of a law laying the tax according to a progressively increasing rate has been upheld in the following cases: *Kochersperger v. Drake* (167 Ill. 122); *Nunnemacher v. State* (129 Wis. 190); *State ex rel. Foot v. Bazille* (97 Minn. 11); *State v. Clark* (30 Wash. 439); *Estate of Magnes* (32 Colo. 527); *Morris' Estate* (138 N. C. 259); *State v. Vinsonhaler* (Nebr.) (105 N. W. Rep. 472).

The foregoing references are from a pamphlet on inheritance tax laws issued by the United States Government (U. S. Govt. Printing Office, 1908).

<sup>22</sup> For a full discussion of the constitutionality of inheritance tax laws, see *Nunnemacher v. State* (129 Wis. 190) decided in 1906.

inheritance tax law as tested by the requirements of the Fourteenth Amendment, is that of *Magoun v. Illinois Trust and Savings Bank*.<sup>23</sup>

In this case the doctrine was reaffirmed that an inheritance tax is not one on property but on the right to take property by devise or descent, and that this, being a right of legislative creation, the States may attach conditions thereunto. Hence, it was held, the States may, in taxing this privilege, discriminate between relatives and between relatives and strangers without violating State constitutional provisions requiring uniformity and equality of taxation, or the provision of the Fourteenth Amendment prohibiting the denial of the equal protection of the laws. The provision of the Fourteenth Amendment, the court said, does not require "exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

In *Billings v. Illinois* <sup>24</sup> the court said: "It is insisted that the classification sustained in the *Magoun* case 'related solely to the graduated feature of the tax.' In the case at bar, it is said, the question is whether or not the Illinois legislature can discriminate against constituents of a certain class, and apply different rules for the taxation of its members. Life tenants constitute but a single class, and the incidents of such an estate, the source thereof, the extent, the dominion over and the quality of interest in the tenant, is the same irrespective of the ultimate vesting of the remainder. The tax is not upon the property, but is upon the person succeeding to the property. Undoubtedly, life tenants, regarded simply as persons, may be in legal contemplation the same; estates for life, regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all to be considered, nor is it determinative. We must regard the power of the State over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based, and we said, in the *Magoun* case, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the State. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute, discriminations may be exhibited, but within the classes there is equality." <sup>25</sup>

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<sup>23</sup> 170 U. S. 283.

<sup>24</sup> 188 U. S. 97.

<sup>25</sup> See also *Campbell v. California* (200 U. S. 87).

Mr. Judson in his valuable treatise, summing up the question of classification for taxing purposes, says: "Classification for taxation is not necessarily based upon any essential difference in the nature or condition of the various subjects. It may be based

It is established that, since the States have the power to curtail the power of disposition of property at death or the privilege of receiving by way of inheritance, they may, in the exercise of such power, make discriminations, in the matter of taxation, as to the exercise or enjoyment of such power or privilege: thus they may graduate the size of the tax upon the exercise of the power to dispose of property by will by the size of the legacy, and they may make exceptions;<sup>26</sup> they may discriminate between property which has not borne its full share of taxation during the testator's lifetime and that which has.<sup>27</sup> In *Stebbins v. Riley*<sup>28</sup> it was held that equal protection was not denied by a State tax law which provided that the market value of property transferred by will should be determined without deduction for any inheritance or estate tax paid to the United States. The court said: "There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation. The incidents which attach to each, as we have observed, may be made the basis of classification. We can perceive no reason why both may not be made the basis of classification in a single taxing statute so that the amount of tax which the legatee shall pay may be made to depend both on the total net amount of the decedent's estate passing under the inheritance and testamentary laws of the State and the amount of the legacy to which the legatee succeeds under those laws. Such a classification is not, on its face, unreasonable. The discrimination is one which bears a substantial relationship to the exercise of the power of disposition by the testator. It is one of the elements in the transfer which is made the subject of taxation. The adoption of the discrimination does not preclude the assumption that the Legislature, in enacting the taxing statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belong to it, and we can find in it no basis for holding the statute unconstitutional."

### § 1283. Denial of Equal Protection by Reason of Mode of Administration.

A number of cases have come before the Supreme Court in which it has been charged by the complaining party that its property has been over-

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as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods so as to produce uniform results, or it may be based upon just and well grounded considerations of public policy." Mr. Judson adds, however, that "while classification may thus be based on differences in the nature or condition of the subjects of taxation, or their want of adaptability to the same methods of taxation, it must rest on some other reason than that of mere ownership." *On Taxation*, §§ 454, 455.

<sup>26</sup> *Plumber v. Coler* (178 U. S. 115).

<sup>27</sup> *Watson v. State Comptroller* (254 U. S. 122).

<sup>28</sup> 268 U. S. 137.

valued as compared with other properties, with the result that it has been unconstitutionally discriminated against. In *Bohler v. Callaway* <sup>29</sup> this complaint was found to be, in fact, justified. The court said: "It is well settled that if the administration of the tax laws of a State [as distinguished from their face provisions] is shown to result in an intentional and systematic discrimination against a complainant by a bill in a Federal court, the court may grant relief by injunction under the State law without deciding the Federal constitutional question upon which jurisdiction of the bill is based." <sup>30</sup>

#### § 1284. Special Assessments.

The matter of special assessments in their relation to the equal protection of the laws has been dealt with in Chapter CII. <sup>31</sup>

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<sup>29</sup> 267 U. S. 479.

<sup>30</sup> Citing *Louisville & W. R. Co. v. Greene* (244 U. S. 522); *Greene v. Louisville and Interurban R. Co.* (244 U. S. 499); *Taylor v. Louisville & N. R. Co.* (31 C. C. A. 537).

<sup>31</sup> For more recent cases dealing with special assessments, see *Valley Farms Co. v. Westchester Co.* (261 U. S. 155); *Durham Public Service Co. v. Durham* (261 U. S. 149); *Milheim v. Moffat Tunnel Improvement District* (262 U. S. 710); *Butters v. Oakland* (263 U. S. 162); *Nampa and Meridian Irrigation District v. Bond* (268 U. S. 50); *Kansas City S. R. Co. v. Road Improvement District* (266 U. S. 379). In this last case the court said: "The settled general rule is that a State Legislature 'may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse' (citing many cases).

"If, however, the statute providing for the tax is 'of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact.' "

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